Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BETTY JEAN RICH, Individually and as Administratrix of the Estate of John Barry Rich, Deceased and as Executrix of the Estate of Johnny N. Rich, Deceased,

Petitioner

v.

UNITED STATES OF AMERICA

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

JASON P. WRIGHT
Counsel of Record
KURT W. MAIER
ENGLISH, LUCAS, PRIEST & OWSLEY
1101 College Street, P. O. Box 770
Bowling Green, Kentucky
42102-0770
(502) 781-6500

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

Petitioner's husband and son were killed when their truck crashed through a bridge railing and plummeted 70 feet over the edge of a dam owned by the United States. The railing had recently been repaired, in a negligent manner, after another truck had crashed through it two months previously. The District Court granted summary judgment based upon the "discretionary function exception" to the Federal Tort Claims Act. The United States Court of Appeals for the Sixth Circuit affirmed. Petitioner requests that this Court review this application of the discretionary function exception to the Federal Tort Claims Act, by the Court of Appeals and United States District Court for the Western District of Kentucky, to instruct as to (1) how courts should determine whether sufficient "political, social, and economic judgments" are involved in a particular decision by governmental agencies and (2) what is the proper standard for reviewing a motion to dismiss or motion for summary judgment in light of Plaintiff's claim that "hidden dangers" known to Corps mandated action.

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CITATIONS OF OPINIONS AND ORDERS

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STATEMENT OF JURISDICTION

This matter is before the Court on petition for writ of certiorari before the United States Supreme Court requesting review of the opinion and judgment of the United States for the Sixth Circuit, filed on July 22, 1997, pursuant to Rule 10(a) and (c). The United States Court of Appeals for the Sixth Circuit denied rehearing by order filed November 14, 1997. The United States Court of

Appeals for the Sixth Circuit reviewed the decision of the United States District Court for the Western District of Kentucky. Appellant presented her claim against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* (1992). The District Court granted defendant, United States of America, summary judgment on July 17, 1996. Appellant filed her Notice of Appeal on August 27, 1996.

STATUTES INVOLVED IN THE CASE

28 U.S.C. §2674: "Liability of United States"

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

28 U.S.C. §2680: "Exceptions"

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. §1346: "United States as defendant"

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive

jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT OF THE CASE

I. Introduction

Petitioner seeks a Writ of Certiorari for this Court to review the scope of 28 U.S.C. §2680(b), the discretionary function exception, and provide guidance to lower courts in order to eliminate the inconsistencies which have occurred in applying this exception to the general waiver of sovereign immunity in 28 U.S.C. §1346(b) and the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* Specifically, 28 U.S.C. §2674 provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

There are statutory exceptions to this general waiver of sovereign immunity; one of which is the discretionary function exception. Created by 28 U.S.C. §2680, the discretionary function exception states:

> The provisions of this chapter and section 1346(b) of this title shall not apply to – (a) Any claim based upon an act or omission of an employee of the Government, exercising due

> care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

Petitioner is aware of the prior guidance provided by the Court in its seminal cases: *Dalehite v. United States*, 346 U.S. 15 (1953); *Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984); *Berkovitz v. United States*, 486 U.S. 531 (1988); and *United States v. Gaubert*, 499 U.S. 315 (1991).

While lower courts have competently repeated the test set forth by these cases, they have been unable to consistently apply the test to determine whether the government should be exempt from the waiver of sovereign immunity. The recent rulings of the Sixth Circuit Court of Appeals have essentially eliminated the entire second prong of the test pronounced in *Berkovitz*, paring the test down to the single issue of whether the government is mandated to act. Other courts have sought, with varying results, to divine whether particular decisions involve sufficient political, economic, or social policies. Petitioner respectfully submits that it is again time for the Court to further define this exception.

Petitioner acknowledges that her case represents a very close determination. The difficulty involved in applying the discretionary function exception to Petitioner's situation provides the Court the much-needed opportunity to illustrate the proper limits of the discretionary function exception.

II. Facts of the Case

A. The accident

This case involves the latest of a series of catastrophic motor vehicle accidents that have occurred at a downhill, 90-degree curve where U.S. Highway 127 North crosses over the Wolf Creek Dam in Russell County, Kentucky. On April 24, 1993, Johnny N. Rich ("Mr. Rich") and his 17-year-old son, John Barry Rich ("John Barry"), were killed when their vehicle went out of control, crashed through a railing on the Dam, and dropped over 70 feet. Betty Rich, wife of Mr. Rich and mother of John Barry, brought an action, individually and as administratrix of Mr. Rich's and John Barry's estates, against the United States under the Federal Tort Claims Act, 28 U.S.C. §2671, *et seq.* (1992) (hereinafter "FTCA").

Most significantly among the allegations against the United States, Petitioner alleged that the United States Army Corps of Engineers (the "Corps") negligently failed to repair the railing, following a similar incident two weeks before, on Wolf Creek Dam at Lake Cumberland (the "Dam") and that it failed to place adequate traffic control devices warning of the hazard. The United States moved for summary judgment, (R. 10, Defendant's Motion for Summary Judgment), and the District Court granted the request. (R. 19, Memorandum Opinion at p. 1, hereinafter "Opinion," attached at Appendix p. 14.)

As it approaches the south end of the Dam, U.S. Highway 127 is a 25-degree downgrade slope. At the bottom of this hill, the road makes a 90-degree curve, with no elevation on the outside of the curve and with a short turning arc, before crossing the Dam. At the end of the curve, on the left-hand side of the road, a railing stands between the motorist and the 70-foot precipice. (R.

12, Response to Motion for Summary Judgment at Exhibit S, hereinafter "Response.") Before a motorist arrives at the curve, there is a yellow flashing light and a reduced speed limit sign. There are no warnings on the railing or warnings regarding the precipice. (R. 19, Opinion at p. 1.) The uncontroverted evidence (from Rich's expert Fred Hanscom) before the District Court was that these devices were inadequate and violated applicable federal highway standards.

On the morning of the accident, Mr. Rich and John Barry were driving north on U.S. Highway 127 in a pickup truck towing a fishing boat. It was drizzling. The pavement, as one approached the Dam, was badly worn. (R. 19, Opinion at p. 1.) As Mr. Rich and John Barry came down the hill and started into the curve, Mr. Rich lost control of their truck. *Id.* The truck slid into the south-bound lane and hit the railing. *Id. See* R. 12, Response at Exhibit B. The railing failed to stop the truck, and the vehicle fell a total of 75 feet over the upstream wall of the Dam before coming to a stop. *Id. See* R. 12, Response at Exhibit B. Mr. Rich was ejected from the vehicle and died on impact. *Id.* The truck burst into flames. *Id.* John Barry's body was discovered inside the truck after the fire was extinguished. (R. 12, Response at p. 1 and R. 12, Response at Exhibit A.) The boat and trailer did not go over the railing but remained on the highway above. (R. 19, Opinion at p. 1.)

Upon seeing the boat and trailer sitting in the road and the broken railing at the edge of the Dam, U.S. Army Corps of Engineers employee Jeff Flowers recognized what had happened because he had seen the same circumstances in previous accidents at that exact location. *Id.* (R. 12, Response at Exhibit B.) He also saw smoke

coming up from where the truck landed. *Id.* He ran back to the Corps building located at the Dam and asked fellow employee Bobby Williams to phone for emergency assistance. *Id.*

Williams reached Mr. Rich first and pulled him away, although Mr. Rich's legs and feet were already on fire. Neither Flowers nor Williams realized that John Barry was inside the truck until after emergency personnel arrived on the scene and extinguished the blaze. (R. 12, Response at Exhibit D.)

Although his lower extremities were severely burned, Mr. Rich died instantly of multiple traumatic injuries sustained in the accident. Once the Fire Department had the fire under control, workers discovered John Barry's severely burned body and removed it from the truck. John Barry's autopsy indicated that his body was burned beyond recognition: his legs were destroyed. His liver and spleen were lacerated. He suffered a fractured pelvis and a severe head injury. (R. 12, Response at Exhibit E.)

B. Wolf Creek Dam and U.S. Highway 127 North

1. Hidden dangers of Wolf Creek Dam and U.S. Highway 127 North

The only evidence in the record established that the danger of the curve approaching Wolf Creek Dam and the inadequate railing was hidden from the driving public, but the Corps was fully aware of it. Rich's expert on road design and hazards, Fred Hanscom, stated by affidavit that the 90-degree turn and railing violated the driver's expectancy. (R. 12, Response at Exhibit A, p. 6.) He testified that the flashing beacon suggests to a motorist that the roadway continues beyond the device as it does at

most intersections. (R. 12, Response at Exhibit A, p. 6.) Hanscom stated that the alignment of the elevated railing immediately beyond the curve creates a deceptive perception to motorists that the roadway continues straight ahead rather than curving to the right. *Id.* Consequently, the only evidence in the record was that the danger was not obvious to a person operating a vehicle.

Both the District Court and the Court of Appeals held that the danger of driving around this 90-degree curve while pulling a loaded boat trailer on a wet road is open and obvious. Granting that the ordinary hazards of those conditions were obvious, the facts controverted that a wet road and sharp curve was the hazard that the Riches were exposed to and that caused the Riches to die.

The record reveals that posted cautionary speed for the curve was 25 MPH. However, according to the testimony of Hanscom, the maximum safe speed to drive through this curve was less than 19.5 MPH under normal driving conditions. (R. 12, Response at Exhibit A, p. 3.) A reasonable driver can be expected to follow posted cautionary speed limits. According to Hanscom, at the posted speed of 25 MPH an operator cannot keep his/her vehicle under control.

Further, the design and surface of the roadway is deceptive to drivers. Highway 127 has a posted speed limit of 55 MPH before a motorist reaches that point where the 25 MPH speed limit can be seen. At that point, there is a steep decline and 90-degree curve, with no elevation on the outside of the curve and with a short turning arc. This results in greater momentum coming into the curve and a design that throws a vehicle toward the railing. There are no rumble strips on the roadway to alert the driver of the need to dramatically reduce speed.

Additionally, the slick surface of the road causes less traction to be available to make the turn. The result is a curve that causes wrecks. Although it was not responsible for the roadway approaching the Dam, the Corps knew that these dangerous features were causing accidents for unsuspecting motorists. (R. 12, Response at Exhibit S.)

Hanscom also noted that the railing provides drivers with a sense of security that they have a margin for error. Drivers naturally would feel that the barrier between them and the 70-foot drop provides protection. It would not be obvious to motorists that the railing would fail to perform its function and would not adequately protect them. This false sense of security means drivers do not recognize the true danger of both the curve and the fall. Instead of protecting motorists, the railing allowed them to plunge more than 70 feet to their deaths.

2. History of prior accidents

This particular curve on Highway 127 has a long history of motor vehicle accidents that have occurred in the same, or similar, manner as the Riches' accident. There have been at least nine accidents, other than the Riches, of which the Corps was aware. Of these nine prior accidents, seven were single-vehicle accidents in which the operator was driving either a car, a pickup truck, or a motorcycle. They involved multiple deaths and serious injuries. (R. 12, Response at Exhibit G and Exhibit H.) All of these accidents involved the same cause and a serious likelihood of hitting the inadequate railing. At least five persons plummeted over or through the railing in these prior accidents.

On February 12, 1993, just two months before the Riches were killed, a truck driven by Nelson Horst failed to negotiate the same 90-degree curve onto the Dam and

crashed through the same railing at the exact place as the Riches. His truck went over the Dam, but his horse trailer stayed on top of the Dam at the edge of the broken railing, just as the Riches' fishing boat had done. (R. 12, Response at Exhibit F; Response Exhibit G; Response Exhibit H.) Mr. Horst destroyed the section of railing that failed the Riches. By the time of the Riches' deaths, the Corps had replaced the damaged railing with a similar, inadequate railing.

While Mr. Rich had driven on this road before, there was no evidence that either he or John Barry knew of the numerous prior accidents, the fact that the railing would fail on impact, the lack of banking in the curve, the danger of the short turning radius, or the height of the precipice.

C. The Corps' awareness of the inadequacy of the railing when replacing it and of a simple, inexpensive means of making the railing adequate

After a number of these wrecks, the railing was either replaced or repaired. On other occasions, the concrete wall adjacent to the railing required repair. On other occasions, the metal support posts for the railing were torn from the roadway and were repaired. Following the February 12, 1993, Horst Accident, the Corps replaced the exact railing which failed the Riches. (R. 12, Response at Exhibit F; Exhibit G; and Exhibit H).

A February 26, 1993, letter written by Corps Resource Manager Thomas M. Wilkerson illustrates that the Corps was fully aware that the curve was dangerous and would cause vehicles to hit the railing. Wilkerson wrote the following comments regarding this curve:

> This is in reference to U.S. Highway 127 crossing Wolf Creek Dam and the dangerous curve at the concrete end of the dam. As you know, it is approximately a 90 degree curve with no elevation on the outside of the curve and a short turning arc. During the past, there have been numerous accidents with several fatalities recorded. (R. 12, Response at Exhibit S) (Emphasis added).

Following the Riches' deaths, the Corps implemented a simple, inexpensive remedy to cure the inadequacy of the railing. It ran steel cable inside the hollow railing. Corps Senior Mechanic Marshall L. Coffey, on April 30, 1993, suggested solving the problem as follows:

> . . . drilling 2 in. holes through the concrete peers and guardrail post in line with the existing guardrails. Recess a notch in the end of the peer at the south end of the dam. Then install a continuous 1-3/8 in. stainless steel wire cable through the holes in the peers and through the existing handrails, connect the ends of the cable together with cable clips in the recessed notch at the end of the peer. Then, fill the notch back with concrete grout to repair the peer back to its original shape. (R. 12, Response Exhibit T.)

On June 10, 1993, the Corps implemented Coffey's repair. In fact, Coffey received a $100 award and a letter from Daniel F. Hall, Chief, Operations, Construction and Readiness Division, complimenting Coffey's repair, that explained:

> This suggestion, effected alone or as part of a more comprehensive plan, will add substantially to the safety of the motoring public when crossing Wolf Creek Dam. (R. 12, Response at Exhibit S.)

Even the District Court noted that "given the history of accidents there is little question that the danger here was well known to the Corps." (R. 19, Opinion at p. 13.) Regardless of the Corps' knowledge of the danger and the simple, inexpensive means of providing an adequate railing prior to the Riches' deaths, the Corps replaced the railing without including the needed steel cable.

III. Procedural Stance of the Case

The Corps moved for summary judgment claiming that jurisdiction did not exist under the FTCA because of the exemption created by discretionary function exception. Petitioner responded by pointing out the lack of any policy implications as to both the negligent repair of the railing and the Corps' failure to adequately warn of the dangers presented by the railing combined with the 70-foot drop. Additionally, Petitioner pointed out that the Corps was mandated to take some remedial action regarding the hidden danger presented by the curve, railing, and precipice.

The District Court granted summary judgment in favor of the Corps. The District Court found that no particular course of action was mandated by statute or regulation. The District Court noted that the Corps was aware of the danger to the driving public. In spite of Petitioner's evidence, the District Court concluded that the danger created by the inadequate railing was open and obvious. Further, the District Court determined that the failure of the Corps to replace the railing adequately after the Horst accident involved policy considerations. *See*, Appendix p. 38.

The Court of Appeals re-characterized the motion for summary judgment as a motion to dismiss for lack of

jurisdiction and upheld the District Court. First, the Sixth Circuit found that "absent mandatory standards and procedures for guardrail replacement, the decision of the Corps to replace the railing in kind immediately after the Horst accident was discretionary in nature, thus satisfying the first condition of the *Berkovitz* analysis." *See*, Appendix p. 9.

Next, the Court of Appeals relied upon the holding of *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993), which will be discussed in greater detail hereinbelow. Despite the factual differences between the *Baum* and Petitioner's claims, the Court of Appeals opined that the "decision of how and when to replace a major element of a substantial public facility is, like the decisions involving design and construction, at bottom a question of how best to allocate resources." *See*, Appendix p. 10, *quoting*, *Baum v. United States*, 986 F.2d at 724.

Finally, the Court of Appeals addressed the argument pursuant to *George v. United States*, 735 F. Supp. 1524 (M.D. Ala. 1990). Under *George*, Petitioner claimed that the discretionary function exception does not apply to the Corps because a hazard known to the Government, but hidden from the public, mandated that the Corps take some action – either to warn of the danger or to remove the danger. The Sixth Circuit agreed with the District Court's factual determination, rendered by summary judgment, that "the steady decline and 90-degree curve were not hidden dangers." *See*, Appendix p. 12. The Court of Appeals did not address Petitioner's proof of the hidden nature of the hazard presented to the driving public at the Dam.

ARGUMENT

Petitioner is among a large group of injured citizens who, apparently, find themselves without any legal redress because of the variable and inconsistent rules applied by courts in attempting to interpret the discretionary function exception. In its previous efforts to address the proper scope of the discretionary function exception, this Court has provided a "framework" for the application of this exception to governmental liability. However, the test enunciated by this Court, apparently, fails to provide sufficient guidance for lower courts to properly apply this onerous doctrine.

Petitioner requests that the Court address two issues. First, Petitioner seeks guidance from the Court as to how courts should determine whether sufficient "political, social, and economic judgments" are involved in a particular decision by governmental agencies. Second, Petitioner asks the Court to describe the proper standard for reviewing a motion to dismiss, or motion for summary judgment, in light of Plaintiff's claim that "hidden dangers" known to the Corps mandated action.

I. Inconsistent applications of the second prong of the discretionary function exception by the lower courts

Petitioner does not attempt to address every case regarding the discretionary function exception because literally hundreds of cases turn on its application. Instead, Petitioner seeks to highlight cases that exemplify the problematic application of the discretionary function exception and set forth the crux of the issues in her case.

A. The Supreme Court's analysis

To briefly summarize the status of the present analysis under the discretionary function exception, as enunciated by this Court, a review of five cases is required. First, in *Dalehite v. United States*, 346 U.S. 15 (1953), the Court addressed a claim that the discretionary function exception barred any action against the government arising from its storage of ammonium nitrate fertilizer and failing to warn of the possibility of an explosion. The Court noted that the exception "covered . . . all employees exercising discretion." *Id.* at 33. The Court, refusing to provide the defining line sought by Petitioner, stated "[i]t is unnecessary to define, apart from this case, precisely where discretion ends." *Id.* at 35-36. However, protected discretionary decisions "include[ ] more than the initiation of programs and activities. . . . " They also "include[ ] determinations made by executives or administrators in establishing plans, specifications, or schedules of operations." *Id.* The Court found that the key to applying the discretionary function exception was turned on policy determinations. Specifically, the Court stated "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. The Court found that the alleged negligence of the United States involved specific policy determinations as to the production, storage, and dissemination of the fertilizers necessitated by the military occupation of Germany, Japan, and Korea. *Id.* at 37-44.

The Court next reviewed the discretionary function exception in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). *Indian Towing* involved the opposite end of the continuum of government action from *Dalehite*. In *Indian*

Towing, the Coast Guard had allowed one of its lighthouses to remain out of service without any warning to shipping and, thereby, caused a ship to founder. The Court held that, while the Coast Guard did not have to undertake to provide a lighthouse, "once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order." *Id.* at 69.

The Court made no significant efforts to further address this area until *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). In *Varig*, the United States allegedly failed to require proper safety inspections of airlines because it employed a "spot check" program, rather than a full compliance program. The Court examined the authority granted to the Federal Aviation Administration ("FAA") and found that broad discretion had been granted for the FAA to delegate inspection responsibility to manufacturers. *Id.* at 804-807. The Court provided that the discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *Id.* at 808. The Court again recognized the difficulty in applying the exception by stating that "it is unnecessary – and indeed impossible – to define with precision every contour of the discretionary function exception. . . . it is possible to isolate several factors useful in determining when acts of a Government employee are protected from liability by §2680." *Id.* at 813.

The first factor identified by the Court is "the nature of the conduct, rather than the status of the actor, that

governs whether the discretionary function exception applies in given case." *Id.* Second, the Court found that the exception "was intended to encompass the discretionary acts of the Government in its role as a regulator of conduct of private individuals." *Id.* The underlying basis of the exception was "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814. The "spot check" policy involved the type of regulatory considerations the Court found exempt from FTCA liability.

Shortly after *Varig*, the Court again faced confusion among the Circuits as to the application of the discretionary function exception in *Berkovitz v. United States*, 486 U.S. 531 (1988). The Court reviewed claims arising from the Government's approval of an oral polio vaccine that caused some of its recipients to develop polio. The Court announced that the examination of the conduct of the government identified in *Varig* was a two-part test: first, whether the action is a matter of choice and, second, whether the permissible judgment was grounded in social, economic, or political policy. *Id.* at 536-37. The Court held that where a course of conduct was specified to the Government agent, the exception would not apply. *Id.* Further, even if the agent had authority to make a decision, "[t]he discretionary function exception applies only to conduct that involves the permissible exercise of policy judgment." *Id.* at 539.

The Court found the petitioner had offered sufficient claims because the implementing officials were not required to make policy judgments. *Id.* at 545-548. Though other claims were founded on mandatory actions by the Government, the Court noted the petitioner's

claim that the oral vaccine had erroneously been determined to comply with safety requirements necessitated an evaluation of whether the erroneous determination was a "policy" determination. *Id.* at 545. However, the Court provided no guidance as to performing that evaluation.

Again, only a few years later, the Court addressed the discretionary function exception in *United States v. Gaubert*, 499 U.S. 315 (1991). The Court addressed the second prong of its test in evaluating whether day-to-day activities of regulators in operating a savings and loan operation were exempt from the FTCA. The Court found that existing regulations allowed regulators discretion and ruled that "the very existence of the regulation creates strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations." *Id.* at 324.

The Court found that where "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Id.* at 324-25. The Court did not address actions taken in the absence of regulations either mandating an action or granting discretion. However, the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." This focus as to whether the objective determination involves a sufficient policy choice follows naturally from the language of the discretionary function exception that exempts decisions

"whether or not the discretion involved be abused." 28 U.S.C. §2680(a).

The Court in *Gaubert* proceeded to evaluate the specific conduct alleged to be improper. The Court noted that the day-to-day operational decisions by the Government agents were "undertaken for policy reasons of primary concern to the regulatory agencies." *Id.* at 332. The Court found that such regulatory involvement protected very specific and identifiable policy interests. *Id.* The Court did not attempt to define where the line should be drawn between considerations that are not grounded on sufficient policy considerations versus those that were or attempt to provide guidelines to evaluate decisions. The result has been a quagmire of inconsistent results.

B. Lower courts' inconsistent rulings

Two opposing ends are presented by the Court in its decisions – one end allowing the Government to avoid any liability for wrongful acts because of policy implications and the other holding the Government responsible for its actions. The problem with the application of the discretionary function exception lies between these two extremes, where an inconsistent line of cases has been drawn by lower courts. Petitioner will try to provide cases and opinions which typify the inconsistencies and highlight the problem created by the current status of the discretionary function exception relating to her claims.

1. Decisions relevant to the inadequacy of the railing

Among the allegations Petitioner advanced against the Corps was the claim that the Corps failed to properly

repair and maintain the railing on the Dam on U.S. Highway 127. The Corps never pointed to any policy reasons regarding the repair of dam railings.

On the contrary, AASHTO standards adopted by the Corps indicate that when a railing is known to be hazardous, it should be replaced. AASHTO Manual for Bridge Maintenance, Ch. 5.0.0, ¶2(a), p. 70 (1987) (R. 12 Response at Exhibit U), provides "where large scale damage occurred in substandard or old type railing, consideration should be given to replacing it with a railing meeting current standards rather then replacing it in kind." While not mandatory in its requirement, this expresses a clear policy of maintaining railing adequately to protect drivers.

The Sixth Circuit applied the holding of *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993), adopting the view that any policy decision involving the allocation of resources caused the "discretionary function" exception to apply, but the facts of *Baum* render it inapplicable. In *Baum*, the claimants made allegations that cast iron poles used to mount a railing on a bridge owned and maintained by the Government were inadequate. Those claimants suggested that the only remedy for the condition was an outright replacement of the entire bridge railing. The Court responded by ruling that suggestion "was one bound up in economic and political policy considerations" involving the allocation of limited resources. *Id.* at 722.

Another example of this reasoning is *Bowman v. United States*, 820 F.2d 1393 (4th Cir. 1987). In *Bowman*, the National Park Service was accused of negligence in failing to provide a railing along Blue Ridge Parkway. The

Fourth Circuit Court of Appeals observed that the decision not to place a railing resulted from many factors, such as safety, aesthetics, environmental impact and available financial resources. *Id.* at 1395. Unlike U.S. Highway 127, the Blue Ridge Parkway "is an unusual highway in that its primary purpose is not to facilitate transportation and travel." *Id.* at 1394.

In *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987), the Ninth Circuit reviewed questions regarding the choice of the National Park Service not to install railings and failing to maintain a scenic road in Denali National Park. As in *Bowman*, the Ninth Circuit found that the Government identified particular concerns regarding the National Park which required "that roads be designed to be 'esthetically pleasing [and to] lie[ ] lightly upon the land utilizing natural support wherever possible.' " *Id.* at 195. The Ninth Circuit departed from the evaluation in *Bowman* in finding that the "fact that Park Service maintenance were required to work within a budget does not make their failure to maintain Thoroughfare Pass a discretionary function. . . . Allocation of funds among projects aimed at bringing Denali National Park roads up to standards is not a decision 'of the nature and quality that Congress intended to shield from tort liability.' . . . Budgetary constraints underlie virtually all governmental activity." Thus, in conflict with *Bowman* and the Sixth Circuit's ruling in the present action, the bare economic concerns of maintaining a Government facility with due care was not protected. *See also Cope v. Scott*, 45 F.3d 445, 449 (D.C. Cir. 1995) ("The mere presence of choice – even if that choice involves whether money should be spent – does not trigger the exception.").

In contrast to the Sixth Circuit's decision in *Baum*, other courts have found that the engineering design choices made by the Government – while implicating policy to some extent – are not inherently protected. Rather, these decisions must have policy overtones to be exempted under the discretionary function exception. For example, in *Seaboard Coast Line Railroad v. United States*, 473 F.2d 714 (5th Cir. 1973), cited by Circuit Judge Boyce Martin in *Caplan v. United States*, 877 F.2d 1314, 1322 (6th Cir. 1989) (*concurring*), the Fifth Circuit addressed a claim regarding the design of a drainage system built as part of an aircraft maintenance facility. The Government was found to have negligently designed the ditch so that it caused a train to derail from a track adjacent to the ditch. *Id.* at 715. The Court found that, having determined that the policy goals were furthered by building a drainage ditch, the government had a duty to carry that task out with due care. The Court stated:

> [t]he discretionary function envisioned by 28 U.S.C. §2680(a) and by *Dalehite* was the government's policy decision to construct an air maintenance facility at Fort Rucker and to build a drainage ditch. Once the government decided to build a drainage ditch, it was no longer exercising a discretionary policy-making function and it was required to perform the operational function of building the ditch in a non-negligent manner. *Id.* at 716.

A distinction exists between the prudent repair of a small section of a broken railing and the policy decision of whether to commit Corps resources to constructing a railing. The latter does require an assessment of all of the factors, *e.g.*, the need for the railing, the aesthetics, available resources and the performance of the operational

function of building an *adequate* railing. In this case, it is not the decision to construct a railing which Petitioner challenged. Rather, Petitioner complained that the Corps' repair of the railing was negligent, in light of the Corps' documented knowledge of the danger.

Similarly, the Eleventh Circuit Court of Appeals, in *Alabama Electric Cooperative, Inc. v. United States*, 769 F.2d 1523 (11th Cir. 1985), addressed the argument that design decisions of government projects are inherently discretionary. The Court ruled that the application of the discretionary function exception turned on whether a policy choice was made. *Id.* at 1536-37. In the case reviewed by that Court, no obvious policy decision existed in designing certain drainage dikes. However, the Court remanded that issue for further review. *Id.* at 1537. *See also Sexton v. United States*, 797 F. Supp. 1292 (E.D. N.C. 1991) ("Plaintiffs' claims, however, are based on the government's negligent design, construction, and maintenance of the grate covering in question. Such acts do not involve policy judgments or discretion and are not covered by the discretionary function exception." *Citing Camozzi v. Roland/Miller and Hope Consulting Group*, 866 F.2d 287, 289-90 (9th Cir. 1989).

In fact, the Sixth Circuit has been inconsistent in its position regarding the application of professional expertise. In *Myers v. United States*, 17 F.3d 890 (6th Cir. 1994), the Sixth Circuit found that the discretionary function exception did not apply to the choices regarding the enforcement of safety standards by a Mine Safety and Health Administration ("MSHA") inspector. The Circuit Court found that assessments of MSHA inspectors "are to be made in light of their own observations, informed by professional judgment and knowledge of the industry"

and not based on political, social or economic policy. *Id.* at 898. Ironically, this position is disputed by the Fourth Circuit, which finds that MSHA inspectors must apply public policy. *Bernaldes v. United States*, 81 F.3d 428 (4th Cir. 1996).

The discretionary function exception was intended to shield only those decisions that are "susceptible to policy judgment" and involve the exercise of "political, social, [or] economic judgment." *Gaubert*, 499 U.S. at 325; *Varig*, 467 U.S. at 820; *Berkovitz*, 486 U.S. at 537. Lacking an indication of the dividing line between decisions involving sufficient policy determinations and those that are simply not adequate, the various circuit and district courts are as unguided as the ships in *Indian Towing*. In the context of analyzing particular actions of the Coast Guard, the Court in *Indian Towing* asked: " . . . [I]s there a rational ground, one that would carry conviction to minds not in the grip of technical obscurities, why there should be any difference in result?" 350 U.S. at 66. This Court is the forum where that line should be drawn and the conflicting holdings of the various Circuits resolved.

2. The lower courts' decision regarding the Corps' failure to warn.

Addressing Petitioner's claim that the Corps failed to provide adequate warnings on the railing and abutment, the Sixth Circuit recognized that the Corps was responsible for warnings on the abutment and railing entering the Dam. *See* Appendix p. 12. The Court of Appeals makes the cursory finding that:

> [c]onsequently, any object markers and warning devices on the railings and abutment fall within the discretionary judgment of the Corps, and

> decisions regarding placement of warnings are protected. . . . *Id.*

The Court of Appeals, by footnote, mentions that *Cope v. Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995) found that type and placement of warning devices was not protected, but that "the decision to post warnings at all on the scenic roadway was protected." *Id.* at p. 11, n. 2. However, in *Cope v. Scott*, 45 F.3d 445 (D.C. Cir. 1995), the District of Columbia Circuit Court of Appeals found that the decision as to where and how to warn of road hazards "did not implicate 'political, social, or economic' policy choices of the sort that Congress intended to protect from suits." *Id.* at 445. The decisions regarding the placement of warning signs are not "fraught with public policy considerations." *Id.* at 451. Nor did aesthetic concerns cause the provision of warning signs to be a policy decision given that warnings were already in place. *Id.* at 452.

Aside from ignoring the difference between the decision about the scenic road in a national park addressed in *Cope*, the Sixth Circuit's ruling is inconsistent with other rulings, including its own determination in *Caplan v. United States*, 877 F.2d 1314 (6th Cir. 1989). In *Caplan*, the Forest Service took bids to cut down trees in an area which previously had been treated with herbicides. *Id.* at 1315. A logger, injured when a herbicide-treated tree fell on him, claimed that the Forest Service failed to adequately warn him of the dangerous conditions. *Id.* The majority found that no policy decision was involved in failing to warn the logger. *Id.* at 1316. The Sixth Circuit found that the case was "governed by a line of cases holding that once the government makes a policy decision protected by the discretionary function exception, it

must proceed with due care in the implementation of that decision." *Id.*

The rulings of other jurisdictions conflict with the Sixth Circuit's conclusory finding of some unstated policy. For example, in *Summers v. United States*, 905 F.2d 1212 (9th Cir. 1990), the Court addressed a claim of failure to warn of the hazards of fire rings on public beaches. The Ninth Circuit found that, while the National Park Service limited signs, those limitations did not prevent warnings of the type suggested. More importantly, "the challenged conduct involved safety considerations under an established policy," though the policy was not mandatory. *Id.* at 1215. Application of safety considerations was not based on policy choices and the discretionary function exception did not apply. *Id.* at 1216.

Another decision conflicting with the Sixth Circuit is *Boyd v. United States*, 881 F.2d 895 (10th Cir. 1989). In *Boyd*, the Corps zoned a particular area of Tenkiller State Park as general use. The plaintiff claimed that the Corps failed to provide adequate warnings of danger of watercraft to swimmers in that area. The Tenth Circuit found that a protected discretionary decision was made in zoning the area for a particular use. *Id.* at 987. However, the Court of Appeals found:

> [a]n alleged failure to warn swimmers of dangerous conditions in a popular swimming area does not implicate any social, economic, or political policy judgments with which the discretionary function exception is properly concerned. *Id.* at 898.

There is no distinction between the failure of the Corps to warn of the hazards present on the Dam and failure of the Corps to warn of the hazards to swimmers in *Boyd*. The results are simply not reconcilable. *See also Butler v.*

United States, 726 F.2d 1057 (5th Cir. 1984) (Government made discretionary decision to dredge waterway, but no discretionary policy decision involved in warning swimmers of hazard created by dredging).

Perhaps one of the strongest statements regarding the application of the discretionary function exception by courts comes from the dissent of a case decided by the Sixth Circuit only days before passing on Petitioner's claim. In *Rosebush v. United States*, 119 F.3d 438 (6th Cir. 1997), the Sixth Circuit reviewed an allegation that a fire pit was negligently designed and the United States Forest Service failed to warn of the hazards of the open fire pit. As in the present case, the majority did not analyze the specific decisions of the Government. Instead, the court found generally that "decisions concerning the proper response to hazards are protected" and "decisions whether and how to make federal lands safe for visitors require making policy judgments protected by the Discretionary Function Exception." *Id.* at 443. Finally, the Court of Appeals held any decision about "whether to warn of potential danger is a protected discretionary function." *Id.*

Circuit Judge Merritt's dissent summarizes the analysis of the Sixth Circuit as meaning "the discretionary function exception has swallowed, digested, and excreted the liability-creating sections of the Federal Tort Claims Act. It decimates the Act." *Id.* at 444. The dissent noted that the second part of the test announced by the Supreme Court "presents an ambiguous standard that is difficult to apply and that has produced a large number of inconsistent holdings in the circuit and district courts." *Id.* at 444-45.

Circuit Judge Merritt agreed that "safety precautions involve some judgement" but could not identify a "social, economic, or political policy behind a decision regarding whether to place gratings or railings or signs near a fire pit to make it safer for the public." *Id.* at 445. The dissent recognized the potential of the discretionary function exception to "swallow" and "emasculate" the FTCA. *Id.* Pointedly stated by the dissent, the decision regarding "the placing of a grate, railing or warning near a fire pit involves measures of prudent safety based on the knowledge and experience of the members of the Forest Service" but should not be considered a protected policy decision. *Id.* at 447.

Similarly, the railing involved in this case had been replaced less than two months before the Rich accident, when Horst crashed through it, in an almost identical manner. The Corps needed only to apply measures of prudent safety based on the knowledge and experience of its Senior Mechanic Coffey. The discretionary decisions as to whether to allocate funds to build a railing, whether the aesthetics outweigh the risk of accidents, or whether the railing somehow affects the environment had already been made. The Corps elected to repair the railing. The Corps failed to include (at least until immediately after the Rich accident) a cheap and simple steel cable which would make the railing adequate. This failure was a lack of care in the engineering field, not a social, political, or economic decision.

The District Court correctly noted that the "critical question to be answered is where to draw the dividing line between the discretionary 'decision' and implementation." Unfortunately, the line being drawn in various

lower courts follows no discernable and, often, inconsistent paths. The decision of the Sixth Circuit effectively destroys the second prong of the test described by the Supreme Court and makes virtually every decision protected – including those which Congress did not intend to shield. The negligence of an administrative agency cost Mr. Rich and his son their lives. Now, the inconsistent application of the discretionary function exception by the judiciary has cost their survivors a remedy for that negligence.

3. Failure by the Court of Appeals to properly consider the effect of Petitioner's claim that the Corps' knowledge of a hidden danger mandated action

Beyond the inconsistent application of the discretionary function exception, Petitioner would preserve her challenge to the Court of Appeals' "finding" that the danger presented by the 90-degree curve on U.S. Highway 127 that caused vehicles to lose control and the inadequate railing that allowed vehicles to plummet off a 70-foot drop was open and obvious. The Court of Appeals made a determination on a summary disposition of this case.[1] Petitioner produced evidence supporting the allegation that the actual danger of the Dam was hidden to the ordinary motorist but known to the Corps. Petitioner's contention is that the Corps was mandated to some remedial action under the holding of *George v. United States*, 735 F. Supp. 1524 (M.D. Ala. 1990). The

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[1] The District Court styled its determination as summary judgment and evaluated facts outside of the pleadings. The Court of Appeals cast the matter in terms of CR 12(b)(1), but noted the similar treatment between the procedural devices.

Court of Appeals finding of fact is improper. Based upon the facts established by Petitioner, the Court of Appeals should have assumed that the danger was hidden from the public and the Corps was aware of it. Thus, additional grounds for reversal exists, provided the requested Writ of Certiorari is granted, and Petitioner seeks to reserve those grounds.

CONCLUSION

The efforts by lower courts to apply the discretionary function exception to the waiver of sovereign immunity created by the Federal Tort Claims Act have resulted in inconsistent and conflicting rulings. Petitioner's case presents the proper case for the Supreme Court to define the scope of the discretionary function exception, which is an important question of federal law, while settling the conflicting positions of the several United States Courts of Appeals. Rule 10(a) and (c). Wherefore, Petitioner requests the United States Supreme Court grant her petition for writ of certiorari.

Attorneys for the Petitioner
JASON P. WRIGHT
Counsel of Record
KURT W. MAIER
ENGLISH, LUCAS, PRIEST & OWSLEY
1101 College Street, P. O. Box 770
Bowling Green, Kentucky
42102-0770
(502) 781-6500

APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24
ELECTRONIC CITATION: 1997 FED App. 0218P (6th Cir.)
File Name: 97a0218p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BETTY JEAN RICH, Individually and as Administratrix of the Estate of John Barry Rich, Deceased and as Executrix of the Estate of Johnny N. Rich, Deceased,	)	
Plaintiff-Appellant,	)	
v.	)	**No. 96-6180**
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Kentucky at Bowling Green.
No. 95-00128 – Thomas B. Russell, District Judge.

Argued: June 12, 1997

Decided and Filed: July 22, 1997

Before: KENNEDY, GUY, and MOORE, Circuit Judges.

COUNSEL

ARGUED: Kurt W. Maier, ENGLISH, LUCAS, PRIEST & OWSLEY, Bowling Green, Kentucky, for Appellant. Kathryn S. Firsching, U.S. ARMY CORPS OF ENGINEERS, Nashville, Tennessee, for Appellee. ON BRIEF: Kurt W. Maier, Jason P. Wright, ENGLISH, LUCAS,

PRIEST & OWSLEY, Bowling Green, Kentucky, for Appellant. Kathryn S. Firsching, U.S. ARMY CORPS OF ENGINEERS, Nashville, Tennessee, James H. Barr, OFFICE OF THE U.S. ATTORNEY, Louisville, Kentucky, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant Betty Jean Rich, individually and as Administratrix of the Estate of John Barry Rich, and Executrix of the Estate of Johnny N. Rich, appeals from the district court order granting summary judgment in favor of Defendant-Appellee United States of America in this action based on the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1992) (FTCA). The district court determined that the actions of the United States Army Corps of Engineers ("Corps") relating to the deaths of Mrs. Rich's husband and son were protected by the discretionary function exception to the FTCA. Accordingly, the district court held that under *Feyers v. United States*, 749 F.2d 1222 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985), it was without subject matter jurisdiction. We affirm.

I

The facts of the incident are undisputed. On the morning of April 24, 1993, Johnny N. Rich and his son, John Barry Rich, were killed when their pickup truck went over the side of the bridge abutment leading to the Wolf Creek Dam at Lake Cumberland, Kentucky, on U.S. Highway 127. The road was slick from an early-morning

rain, and their truck was unable to make the 90-degree turn at the bottom of a steady 25-degree downgrade. The truck jumped a curb and went through the barrier at the south end, falling to the bottom of the dam before bursting into flames. The boat and trailer remained on the highway above. Both of the men died at the scene as a result of injuries sustained in the accident. Joint Appendix (J.A.) at 57 (Kentucky State Police Report, 4/24/93).

The area where the accident occurred is administered and maintained by both the Corps and the Commonwealth of Kentucky. The dam is owned by the United States, but the roads, originally designed by the Corps, were later conveyed to and are now owned and maintained by Kentucky. J.A. at 60-61 (Easement ¶ 1); J.A. at 87-90 (Quitclaim Deed). Part of the conveyance included an easement which states "the United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the construction, maintenance, and use of said road." J.A. at 62 (Easement ¶ 11). Although the United States retained responsibility for the maintenance and upkeep of the roadway over the concrete portion of the dam, it does not maintain the 90-degree curve. The 90-degree curve is part of the portion of the road maintained by Kentucky, and Kentucky is responsible for traffic control devices warning of the approach of the curve. J.A. at 62 (Easement ¶¶ 14-15). The road had flashing lights, arrow signs, and speed limit warnings leading down to the dam. *See* Appellant's Br. at 30.

There have been a number of accidents over the years in the area around the dam. Following an accident on February 12, 1993, the Corps replaced approximately 30

feet of guardrailing. The railing, and two steel posts, were damaged when Nelson Horst lost control of his truck traveling down the same section of road as the Riches. J.A. at 213 (Monthly Operating and Maintenance Summary, February 1993). A new guardrail was in place by the time of the Rich accident, constructed using the same design as the guardrail which gave way to the Horst vehicle. The Rich vehicle broke through the replacement railing a little over a month later. *See* Appellant's Br. at 11.

Rich instituted this suit in the U.S. District Court for the Western District of Kentucky. The United States moved for summary judgment on the grounds that the district court lacked subject matter jurisdiction because the actions of the United States qualified for the discretionary function exception to the FTCA. The plaintiff contends the Corps's actions were not discretionary and that the Corps was required to warn of a known and hidden danger. The district court granted the defendant's motion, finding the United States was insulated from liability under the exception, and dismissed for lack of subject matter jurisdiction.[1] We affirm the district court's order.

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[1] Properly, the district court was granting a motion to dismiss for lack of jurisdiction, under Federal Rule of Civil Procedure 12(b)(1), rather than a motion for summary judgment. It was treated as a summary judgment motion by the district court, however, and we affirm the dismissal. The difference is immaterial in this case. *See Cook v. Providence Hospital*, 820 F.2d 176, 178 (6th Cir. 1987) (observing that a court should treat a Rule 12(b)(1) motion that is filed with a supporting affidavit as it would a motion for summary judgment); *Exchange Nat'l Bank of Chicago v. Touche Ross & Co.*, 544 F.2d 1126, 1131 (2d Cir. 1976) (Friendly, J.) (noting

II

Because the question before us is the legal issue of the district court's jurisdiction, we review the decision below de novo. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244, 1248 (6th Cir. 1996) (question of federal subject matter jurisdiction reviewed de novo). A dismissal for lack of federal subject matter jurisdiction is appropriate if the United States qualifies for the discretionary function exception to the FTCA. *Feyers v. United States*, 749 F.2d 1222, 1225 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985).

The district court had jurisdiction, if at all, under 28 U.S.C. § 1346, as the United States is defending the claim. We have jurisdiction over this timely appeal under 28 U.S.C. § 1291.

A

Rich brought her case under the Federal Tort Claims Act, which waives some of the United States' sovereign immunity and generally authorizes suits against the United States for damages

> for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the

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similarities between treatment accorded 12(b)(1) motions and motions for summary judgment). *Cook* also noted that as with a motion for summary judgment, the district court need not hold a hearing on a Rule 12(b)(1) motion in the absence of complex legal or factual questions. *Cook*, 820 F.2d at 178.

> United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b). The discretionary function exception of the FTCA, however, preserves some of the sovereign immunity. It states that the provisions of the Act shall not apply to

> [a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance, or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). When the circumstances of a case fall within this statutory exception, the court lacks subject matter jurisdiction. *Feyers*, 749 F.2d at 1225.

The text of the statute seems clear. The interpretation of the exception, however, has been difficult for the courts. The hallmark case interpreting the discretionary function exception was *Dalehite v. United States*, 346 U.S. 15 (1953). The Supreme Court stated that discretionary acts and functions of government were intended to be protected from suit, and that "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. The concept of protection of policy judgments is maintained in the current Supreme Court standard for interpreting the discretionary function exception articulated in

Berkovitz v. United States, 486 U.S. 531 (1988), and later upheld in *United States v. Gaubert*, 499 U.S. 315 (1991).

The *Berkovitz* analysis involves two conditions which must be met for the exception to apply. The first condition a court must find is that the action involved was a matter of choice for the employee. "[C]onduct cannot be discretionary unless it involves an element of judgment or choice." *Berkovitz*, 486 U.S. at 536 (citing *Dalehite*, 346 U.S. at 34). The logic behind this first condition is that the exception should not apply if there is a federal statute, regulation, or policy specifically prescribing a course of conduct or action for the employee. If there is no such prescription, the employee must exercise judgment and some protection should be provided for this exercise. *Id.*

Assuming the challenged action of the government involves an element of judgment, a second condition must be met for the exception to apply. "[A] court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id. United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), explains the logic of this second condition. "Congress wished to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 814.

"In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 537. The district court found that the Corps's decision to replace the

guardrail with one of the same design was discretionary as a matter of law, and this court agrees.

As the district court notes in its thoroughly analyzed and carefully written opinion, the plaintiff offered several design guidelines for bridges, attempting to convince the court that the Corps was under a duty to follow them. Rich cited standards set forth in the American Association of State Highway and Transportation Officials MANUAL FOR BRIDGE MAINTENANCE (1987) ("AASHTO Manual"), the manual that federal regulations recognize to be a guideline for the design of guardrails. *See* 23 C.F.R. §650.303(a) & n.1. Rich conceded, however, that the design guidelines were not mandatory. The very language used in the manual indicates it is a suggestion, not a requirement. The AASHTO Manual suggests that "[w]here large scale damage has occurred in substandard or old type railing, consideration *should* be given to replacing it with a railing meeting current standards rather than replacing in kind." J.A. at 268 (AASHTO Manual at 70) (emphasis added). Further, AASHTO, the regulatory organization plaintiff cites, recognizes its own limitations. A preface to the AASHTO Manual states

> [t]his manual has been prepared to serve as a guide to use as a single source reference and *not intended to set national standards* because of the varying conditions and limited resources of manpower, equipment, and materials. . . . We intend the manual to solely identify a problem area and *make recommendations* that are considered to be effective operation and efficient management methods directed toward solving the problem.

Appellee's Br. Exhibit B (AASHTO Manual) (emphases added).

We agree with the district court's assessment that the regulations addressing bridge maintenance only prescribe inspection standards, and do not provide regulatory standards regarding the replacement or rehabilitation of railings. Absent mandatory standards and procedures for guardrail replacement, the decision of the Corps to replace the railing in kind immediately after the Horst accident was discretionary in nature, thus satisfying the first condition of the *Berkovitz* analysis.

The second condition of the *Berkovitz* analysis for the application of the discretionary function exception is that the decision must be of the kind the exception was intended to shield. The district court cited a line of cases in which courts have ruled that where a federal agency, here the Corps, must balance competing needs when deciding how to run a federal facility, the discretionary function exception to the FTCA has been held to apply. In *In re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988), this court held that a decision by the Corps regarding how to alleviate ice problems near federal dams on the Ohio River was covered by the exception on the grounds that "[t]he purpose of the exception is 'to prevent the courts from intruding . . . upon the decisionmaking authority of the other branches of government.' " *Id.* at 1248 (quoting *Estate of Callas v. United States*, 682 F.2d 613, 620 (7th Cir. 1982)). The decision by the Corps to replace the guardrail at the Wolf Creek Dam with one of the same design as the damaged rail was a decision the Corps was free to make, and one which the exception was intended to protect.

The Fourth Circuit provides a persuasive argument for upholding the district court's dismissal of Rich's claims in its decision in *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993). The *Baum* court concluded that the government was immune from suit for an accident in which a passenger vehicle broke through a guardrail owned and maintained by the National Park Service. The plaintiff in that case, like Rich, claimed negligence in the design, construction, and maintenance of the guardrail. *Id.* at 718. There, as here, no mandatory statutes, regulations, or policies governed the design and construction. *Id.* at 721. The *Baum* court found that the planning level decisions by the National Park Service were the same type protected by the Supreme Court in *Gaubert*. *Id.* at 722 (citing *Gaubert*, 499 U.S. 315 (1991)). The court rejected the plaintiff's argument that the National Park Service should have redesigned the guardrail system. The Fourth Circuit was persuasive in their conclusion that

> [t]he decision of how and when to replace a major element of a substantial public facility is, like the decisions involving design and construction, at bottom a question of how best to allocate resources. Such a decision is inherently bound up in considerations of economic and political policy, and accordingly is precisely the type of governmental decision that Congress intended to insulate from judicial second guessing through tort actions for damages.

Id. at 724.

In *Reminga v. United States*, 631 F.2d 449 (6th Cir. 1980), Judge Lively stated the Sixth Circuit's view on the discretionary function exception. Although the decision

was pre-*Berkovitz*, the analysis still applies. Judge Lively wrote,

> [i]t appears that this court has consistently held that the discretionary function exception . . . does bar liability based on "deliberate official decisions and directives," failure of a regulatory agency to meet particular requirements desired by a member of the public when the desired action is not explicitly required by statute or regulation, and decisions generally which have "policy overtones."

Id. at 456 (citations omitted). The Corps's action had "policy overtones" and was not "explicitly required by statute or regulations," and therefore should be protected by the discretionary function exception. Because the discretionary function exception applies to the case at bar, the district court was correct in dismissing this action.

B

Plaintiff additionally asserts that the discretionary function exception does not apply to this FTCA claim because the Corps failed to comply with a duty to warn of hidden danger. This court agrees with the district court that the danger surrounding the Wolf Creek Dam was open and obvious, relieving the Corps of any duty to warn. Plaintiff relies on *George v. United States*, 735 F. Supp. 1524 (M.D. Ala. 1990), for support. In *George*, the court held that the exception did not apply where the government failed to warn swimmers in a National Forest recreation area of the presence of an alligator because the alligator was a hidden danger known to Forest Service

officials which required a warning to users of the recreation area. *Id.* at 1526. Unlike the alligator, the steady decline and 90-degree curve were not hidden dangers. Where the danger is not hidden, there is no duty to warn. *Id.* at 1532. The Riches had driven by the dam before, had negotiated the 90-degree curve, and were aware of the hazardous conditions. As the district court noted, "[t]he danger presented in negotiating the turn at the south end of Wolf Creek Dam was self-evident." J.A. at 26 (Dist. Ct. Op. at 13). *See Chrisley v. United States*, 620 F. Supp. 285, 292 (D.S.C. 1985) (holding the United States had no duty to warn of obvious danger at a Corps-maintained dam and lake). Further, the slick road conditions from the morning rain may fall under what Kentucky courts have described as "obvious natural hazards" which absolve landowners of liability for a failure to warn invitees of the dangers of natural conditions. *Caplan v. United States*, 877 F.2d 1314, 1317 (6th Cir. 1989) (stating Kentucky landowners are insulated from liability for failure to warn or protect against "dangers that are created by the elements, such as forming of ice and the falling of snow") (quoting *Standard Oil Co. v Manis*, 433 S.W.2d 856, 858 (Ky. 1968)).

Moreover, plaintiff maintained on appeal that there should have been warning devices in addition to the ones already in place, including object markers on the guardrail and bridge abutment. This court recognizes that although the road is maintained by Kentucky and any warnings on the road are the responsibility of Kentucky, the railings and abutment are the responsibility of the Corps. Consequently, any object markers and warning

devices on the railings and abutment fall within the discretionary judgment of the Corps, and decisions regarding placement of warnings are protected by the discretionary function exception of the FTCA. Any duty to warn of this open and obvious hazard is discretionary and exempt from an action in tort.[2]

III

For the reasons stated above, we hold that the actions of the Corps fell within the discretionary function exception to the FTCA. We therefore **AFFIRM** the order of the district court dismissing the claim for lack of subject matter jurisdiction.

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[2] Plaintiff argues that *Cope v. Scott*, 45 F.3d 445, 451 (D.C. Cir. 1995), supports her contention that a duty to warn is not protected by the discretionary function exception. The District of Columbia Circuit, however, held that while the type and placement of warning devices may not be protected by the exception, the decision to post warnings at all on the scenic roadway was protected as a discretionary function. In the case at bar, the Corps's decision not to place warnings in addition to those posted by Kentucky is protected as well. This court is not reviewing the decision of the location or type of markers the Corps placed, but rather the decision to post warning markers at all. We hold such a decision to be discretionary and protected.

United States District Court
Western District of Kentucky
at Bowling Green

Betty Jean Rich, individually
and as the Administratrix of the
Estate of John Barry Rich, Deceased,
and as the Administratrix of the
Estate of Johnny N. Rich, Deceased, Plaintiff

vs. Case No. 1:95cv128-R

United States of America, Defendant

Memorandum Opinion

This is an action for damages under the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* (1992) (hereinafter "FTCA"). Defendant has moved for summary judgment. The motion is granted for the reasons set forth below.

I. Factual Background

Johnny N. Rich and his 17-year old son John Barry Rich were killed in a car crash on April 24, 1993. The two were driving north in a pickup truck and towing a fishing boat on a trailer on U.S. Highway 127 in Russell County, Kentucky. It had rained earlier that morning and the road was slick. The road approaching the south end of the Wolf Creek Dam at Lake Cumberland was a steady 25-degree downgrade, which then made a 90-degree right turn before reaching the dam. The road had flashing lights, arrow signs, and speed limit warnings leading down to the dam.

Unable to make the turn, their truck jumped a curb and went through the barrier at the south end of the dam.

The barrier consisted of a 18-inch high solid concrete form, and on top of that two steel posts mounted horizontally between concrete dividers.

Their vehicle fell 40 feet to the bottom of the dam, overturned and slid 35 feet before righting itself. The truck burst into flames. Neither of the two were wearing seatbelts. Both died as a result of injuries sustained in the accident.

The area where the accident occurred is administered and maintained jointly by the United States Army Corps of Engineers ("Corps") and the Commonwealth of Kentucky. The roads leading to the dam were designed by the Corps and constructed under its direction in the 1940s. The roads were later conveyed to Kentucky by quitclaim deed. While the dam itself is still owned by the United States, Kentucky now owns both roads approaching the dam.

Kentucky also has a right-of-way easement over the dam. The easement provides:

> 11. That the United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the construction, maintenance, and use of said road.
>
> 14. That the United States shall be responsible for the maintenance and upkeep of the roadway over the concrete portion of the Wolf Creek Dam, Lake Cumberland, subject to availability of appropriations.
>
> 15. That the Commonwealth of Kentucky shall be responsible for the maintenance and upkeep of the roadway along the earth fill portion of the Wolf Creek Dam, Lake Cumberland.

The Corps does not maintain the 90-degree curve on the approach to the dam because it is not part of the concrete portion of the dam. By custom, the concrete portion of the dam begins at the first expansion joint. The Corps is responsible for the inspection and maintenance of the bridge railings, which are considered part of the bridge.

The Corps regulation covering the inspection of the bridge was ER 1110-2-100. The Corps has inspected the bridge every two years as recommended by the regulation.

There have been a number of accidents in this area over the years. The United States had received reports of other accidents. One such accident occurred shortly before the Rich accident. On February 12, 1993 Nelson Horst lost control of his truck going down this same section of road. His truck broke through two steel posts and approximately 30 feet of guard railing over the dam. That same day, Corps personnel put in place a temporary railing. They then constructed a new permanent railing which was installed on March 9 and 10, 1993. The Rich accident occurred a little over a month later.

II. Applicable Law

If there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law, summary judgment must be entered. Fed.R.Civ.P. 56(c); *Lockett v. United States*, 938 F.2d 630, 632 (6th Cir. 1991). That standard is met when a reasonable fact finder could not find for the nonmoving party. *Street v. J.C. Bradford & Co.*, 886 F.2d 1472 (6th Cir. 1989).

28 U.S.C. § 1346(b) provides this court with subject matter jurisdiction over plaintiff's claims:

> . . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

The FTCA is viewed as a waiver of the United States' sovereign immunity to certain types of tort claims. However, there are exceptions to that waiver. The most prominent of these is the exception for the performance of discretionary functions. The FTCA does not apply to a claim:

> based on the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved is abused.

28 U.S.C. § 2680(a) (1992). This exception is jurisdictional, and if it applies, the district court lacks subject matter jurisdiction over the cause. *Feyers v. United States*, 749 F.2d 1222, 1225 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *In re Ohio River Disaster Litigation*, 862 F.2d 1237, 1244 (6th Cir. 1988).

The discretionary function exception was designed by Congress to eliminate the possibility that a tort action

could be used as a means to challenge policy decisions. *Varig Airlines v. United States*, 467 U.S. 797, 814 (1984). Courts interpreting the provision have held that for the exception to apply, two conditions must be met. First, the government action must not be contrary to an established, mandatory statute, regulation, or policy that specifically prescribes a course of conduct for the government to follow in the situation in question. *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). Second, the government action must involve the permissible exercise of discretionary authority. *Gaubert v. United States*, 499 U.S. 315, 322 (1991). That is, the decision must involve consideration and weighing of factors grounded in public policy. *Caplan v. United States*, 877 F.2d 1314, 1316 (6th Cir. 1989) ("The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy.")

It is now well-established that the inquiry must focus on the nature of the decision made, not on the person who made it. *Varig Airlines*, 467 U.S. at 813. Supreme Court cases have indicated that "planning" decisions are not actionable, whereas "operational" decisions implementing the planning decisions can be the basis for liability. The Court made clear, however, that the "planning" or "operational" level of the official being sued is not controlling, *United States v. Dalehite*, 346 U.S. 15, 35-36 (1953) ("the acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable."), it is the character of the decision that matters.

This distinction drawn between discretionary planning decisions and operational implementation of those

decisions has been reinforced in the case law. Many holdings indicate that while an initial policy-based decision may not be actionable, the implementation of that decision can be. This is particularly true when the claim arises out of the administration of public works. For example, in *Miller v. United States*, 583 F.2d 857 (6th Cir. 1978), the Sixth Circuit found that the discretionary function exception applied to bar a claim arising out of the release of large quantities of water through federally managed locks and dams. The Sixth Circuit stated "[t]he Government's agents did not open the gate in the dam in a negligent manner. They merely abused their discretion as to when to open it." *Id.* at 867. Thus the original decision to open the dam was discretionary, and there was no liability for negligence in that decision. The quoted statement above implicitly acknowledges the potential liability of the government had the theory of recovery been that the manner in which the gate was opened was negligent, as that action would merely have been the implementation of the policy-based decision to open it in the first place. *Gaubert* correctly noted the distinction between planning decisions and operational decisions may offer some guidance, the case law does not suggest that a decision made at the operational "level" could not also be based on policy, and thus fall within the exception.

III. Analysis

First, plaintiff has offered a number of design guidelines for bridges, and appears to argue that the Corps was constrained to follow them in its design of the rebuilt guardrail. It is not clear to the court the guidelines are

applicable to the Corps. The fact that they are referred to in a document requiring periodic inspection of bridges does not mean they are binding upon the Corps. Nor has the plaintiff provided any statutory or regulatory authority demonstrating that they apply to design decisions by the Corps. Without more than is in the record before the court, it would be inappropriate to hold these guidelines binding on the Corps. *Baum v. United States*, 986 F.2d 716, 722 (4th Cir. 1993). Neither do the guidelines appear to be sufficiently mandatory in character to require the design that plaintiff's expert suggests. The court agrees with the Fourth Circuit's statement in *Baum* that "very general, sweeping language is insufficient to remove questions of design and construction of guardrails on the parkway from the discretion of the National Park Service." *Id.*

As for the second prong of the *Gaubert / Berkovitz* analysis, the court notes that the applicability of the discretionary function exception depends on the action complained of in the plaintiff's complaint. The United States has moved for summary judgment in relation to any claim that 1) it was negligent for the Corps to install a temporary railing rather than a permanent one after the Horst accident, 2) it was negligent in failing to install traffic control devices at or near the approach to the dam, 3) it was negligent in the design of the approach to the dam, and 4) it was negligent in the initial design of the dam. In her responsive pleadings, plaintiff has essentially stated that she will not seek recovery in relation to these alleged activities and these other theories. Accordingly, summary judgment is granted to the defendant on these claims. Plaintiff has made clear that her theory of recovery is that the design used by the Corps for the rebuilt

guardrail was defective because it did not include steel cables running inside the horizontally-mounted steel posts, and did not include traffic control devices mounted on the dam itself.

In analyzing whether the government action involved here constituted the execution of a discretionary function, the cornerstone of the analysis must always be whether the action complained of was of the kind for which Congress intended to shield the United States from liability. *Varig Airlines*, 467 U.S. at 813 ("The basic inquiry . . . is whether the challenged acts . . . are of a nature and quality that Congress intended to shield from tort liability.") While the wording of the statute is usually considered the best indicator of congressional intent, the court does not begin with a clean slate. Several decades of case law have provided guidance to the court in its decision. Justice Scalia's concurring opinion in *Gaubert* even noted that "[u]nfortunately, lower courts have had difficulty in applying the test. *Gaubert*, 499 U.S. at 335 (Scalia, J., concurring). The black letter law is easily stated. The application is more difficult.

There is a class of cases wherein the conduct complained of essentially challenges the manner in which a given agency has chosen to implement its own regulations. For example, in *Varig Airlines*, the Supreme Court insulated from liability the decision of the FAA to allow airlines to self-inspect for compliance with FAA regulations for safety certification. Similarly, in *Lockett*, the Sixth Circuit applied the exception to prevent a suit against the EPA based on the allegation that the EPA's response to the discovery of PCBs was negligent. The court concluded that the EPA's response was not constrained by

any mandatory directive, *Id.* at 636, and the decision not to investigate the PCBs upon their initial discovery was based on a decision on how to allocate scarce resources, and thus fell within the exception. *Id.* at 639. This line of cases essentially holds that such decisions involve the balancing of competing policy considerations, and thus must be left to agency discretion.

A second class of cases involves public works. These are tort actions where property damage or personal injury occurs as a result of the administration or design of federally-run facilities. For example, in *Wright v. United States*, 568 F.2d 153 (10th Cir. 1977), the Tenth Circuit held that conduct of the Bureau of Indian Affairs in assisting the State of Utah in the designing and constructing of a bridge and the approaches to it was protected by the discretionary function exception. *Id.* at 158-59. Similarly, in *in re Ohio River Disaster Litigation*, the Sixth Circuit determined that Corps' decisions on how to pass ice through federal dams on the Ohio River were covered by the exception. In such cases, where the federal agency is required to balance competing needs in deciding how to run the federal facility, the discretionary function exception has been held to apply.

The case at bar clearly falls into the second category. The United States has provided some strong authority favoring dismissal. Many courts have held that design specifications for construction projects involve considerations of public policy, and thus determining which design to choose constitutes the execution of a discretionary function. For example, in *Baum v. United States*, 986 F.2d 716 (4th Cir. 1993), the Fourth Circuit stated:

> The question of what materials to use in such a project is also fundamentally described as a question of how to allocate limited resources among competing needs. Considered in this light, we are of the opinion that the Park Service's decision in this regard plainly was one bound up in economic and political policy considerations. . . . we find the design and construction decisions in this case to be just the kind of planning-level decisions of which the Court spoke in *Gaubert*.

Id. at 722. Similarly, in *Bowman v. United States*, 820 F.2d 1391 (4th Cir. 1987), the plaintiff alleged that the National Park Service was negligent in its failure to construct a guardrail along a scenic wilderness highway. The court noted:

> National Park Service officials have more than safety in mind in determining the design and use of man-made objects such as guardrails and signs along the Parkway. These decisions require balancing many factors: safety, aesthetics, environmental impact and available financial resources. In making each decision these factors must be weighed carefully in accordance with the policies of the National Park Service. . . . Whether that decision [not to build a guardrail] grew out of a lack of financial resources, a desire to preserve the natural beauty of the vista, a judgment that the hazard was insufficient to warrant a guardrail, or a combination of all three is not known. What is obvious is that the decision was the result of a policy judgment.

Id. at 1395. The Fourth Circuit accordingly held that the discretionary function exception barred the plaintiff's

claims. If followed, each of these cases would require dismissal of plaintiff's case.

A. The Decision / Implementation Distinction

Plaintiff seeks to distinguish these cases by arguing that she makes no claim that the initial design of the dam was defective, but rather the Corps' decision to repair the guardrail with the same design was negligent. Plaintiff asserts that she is therefore not attacking the original discretionary decision, but rather its implementation, which she characterizes as merely an "operational" task not involving a discretionary function. Plaintiff's theory is that the actions of the Corps were essentially maintenance of the bridge, rather than construction. If accepted, this case would be most similar to *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and its progeny, where the Supreme Court held that the failure to maintain and operate a light house with due care was actionable under the FTCA, *Id.* at 69, after the government conceded that such maintenance fell outside the discretionary function exception. *Id.* at 64.

Because the government in *Indian Towing* only sought to avoid liability using a "governmental function" analysis, and conceded that the discretionary function did not apply, subsequent Supreme Court cases like *Gaubert* and *Varig Airlines* have brought into question *Indian Towing's* value as precedent. *Indian Towing* remains viable to the extent that it teaches that the exception does not apply where it is clear that the conduct complained of involves the maintenance of public works, as such maintenance is the mere implementation of the prior decision to establish

the federally run facility. But *Indian Towing* teaches nothing further about what kinds of decisions are discretionary in nature and where the initial decision ends and implementation begins. *Baum*, 986 F.2d at 723 ("subsequent decisions of the Court have all but disavowed *Indian Towing* as authority relevant to the discretionary function exception . . . "). It certainly remains true that once the discretionary function of the government has been made, that decision must be carried out with due care. *Caplan*, 877 F.2d at 1316; *Reminga v. United States*, 631 F.2d 449 (6th Cir. 1980) (decision to issue navigational charts is discretionary, but FAA's failure to accurately locate hazards on chart is not). But the critical question to be answered is where to draw the dividing line between the discretionary "decision" and its implementation.

The court finds the case of *Myslakowski v. United States*, 806 F.2d 94 (6th Cir. 1986), *cert. denied*, 480 U.S. 948 (1987) particularly instructive. In that case, the Sixth Circuit held that the Post Office's decision to sell jeeps without a warning about the risk of rollover was protected by the discretionary function exception. The court specifically rejected the distinction offered by the district court, to wit: that the decision to sell the jeeps was discretionary, but the "manner" of the sale, including the failure to include a warning about the risk of rollover, was a mere operational task implementing the decision to sell, and did not involve the balancing of competing social, economic, and policy considerations. *Id.* at 96-97.

The distinction accepted by the district court in *Myslakowski* and rejected by the Sixth Circuit is precisely the distinction offered by plaintiff here. Plaintiff asks the

court to conclude that the decision to rebuild the guardrail was discretionary but the design chosen to implement that decision was not. It is not possible to artificially bifurcate the actions of the Corps in this manner. The decision as to how the guardrail should be rebuilt is part and parcel of the decision to rebuild it at all.

Plaintiff cites a number of cases in support of her argument. In *Caplan v. United States*, 877 F.2d 1314 (6th Cir. 1989), the court held that the decision to deforest part of Daniel Boone National Forest was discretionary, but it had to exercise due care by warning a tree cutter of the danger of trees falling as a result of a prior mass herbicide treatment. The latter conduct was held to constitute an "operational" decision implementing the decision to deforest the area. In another case, a panel of the Sixth Circuit concluded without discussion that the Corps' failure to periodically inspect a dam pool, failure to replace a broken latch pin, and failure to sufficiently train lock personnel constituted "operational, non-policy decisions" that fell outside the exception in *in re Ohio River Disaster Litigation*, 862 F.2d 1237 (6th Cir. 1988). However, the panel found that the discretionary function exception barred a suit against the Corps for three other actions in relation to the partial freezing of the Ohio River. The decision not to redirect water flow away from a power plant, the decision not to coordinate ice flow at two dams, and the failure to compensate for a deteriorated condition of the dam were all held to fall within the exception because they involved policy considerations.

There is language in *Complaint of Walker's Midstream Fuel*, 636 F. Supp. 339 (W.D. Ky. 1986) which suggests that

the Corps' decision to place closure panels on the Smithland locks and dam was not a discretionary function, as that court concluded it did not involve a policy judgment. *Id.* at 349. However, the court notes that the pertinent conduct complained of in that case was not the decision to install the panels in the first place. Rather, the Corps had failed to remove the panels some ten months after its first opportunity to do so, despite the fact that the Corps had previously made a decision to remove the panels once the dam reached its pool. *Walker's Midstream* held that although the decision to place the panels was discretionary, as was the decision to remove them once the dam reached its pool, the failure to remove them in accordance with its prior decision to do so was actionable negligence in the implementation of the earlier decision under the rule of *Indian Towing*. *Walker's Midstream*, 636 F.Supp. at 349; *Arkansas River Company v. CSX Transportation*, 780 F.Supp. 1138, 1141 (W.D.Ky. 1991). *Walker's Midstream* is factually distinguishable from the case at bar as plaintiff does not complain that the Corps failed to implement an earlier decision. In *Arkansas River*, the Corps' failure to inspect a steel fender system running along a dam was held to fall outside the discretionary function exception. Again, that case involved the failure to maintain federal property, not an allegation challenging the sufficiency of a design choice made by the government, and thus was controlled by cases like *Indian Towing*, *Caplan*, and *Reminga*. *Arkansas River Company*, 780 F.Supp. at 1140-1141.

In *Morris v. United States*, 585 F.Supp. 1543 (W.D.Mo. 1984), the court held that the Corps' decision regarding the use and placement of berms across a road was not

protected by the exception, although the court offered no explanation for that conclusion, other than citation to other cases involving federal property. In that case, the court found against the plaintiff because it found the proximate cause of the accident was the plaintiff's own intoxication. One case cited in *Morris* was *Foster v. United States*, 183 F.Supp. 524 (D.N.M. 1959), *aff'd without opinion*, 280 F.2d 431 (10th Cir. 1960), where that court stated, again without any discussion or justification, that the failure of the Corps to place guardrails on a bridge was not covered by the discretionary function exception. The court's one-sentence statement was made after the court had concluded that the plaintiff's own contributory negligence completely barred any recovery, and thus should properly be viewed as *dicta*.

In *Sexton v. United States*, 797 F.Supp. 1292 (E.D.N.C. 1991), the district court held, *inter alia*, that the design and maintenance of a metal grate was not covered by the discretionary function exception. As support for this conclusion, the court relied in large part on *Camozzi v. Roland/Miller and Hope Consulting, Inc.*, 866 F.2d 287 (9th Cir. 1989) for the proposition that "the design, construction, and maintenance of the grate covering in question" were not covered by the exception. *Sexton*, 797 F.Supp. at 1301. The district court's reliance was misplaced, as the plaintiff's theories of recovery in *Camozzi* did not challenge any aspect of the grate's design.

In *Camozzi* the Ninth Circuit held that the plaintiff's claim that the Postal Service violated a mandatory duty to exercise reasonable care to see that an independent contractor protects its employees from special risks was barred by the discretionary function exception under

Varig. The Ninth Circuit then held that because the Postal Service had nonetheless retained responsibility for overseeing compliance with some, but not all, safety precautions, an allegation that the Postal Service was negligent in performing that duty was actionable because the failure to perform one its retained duties was not the result of policy choices, rather it was simply the failure to implement the previous policy choice to police compliance with safety standards, again under the rule of *Indian Towing*. *Camozzi*, 866 F.2d at 290. The court's reading of *Camozzi* fails to reveal any support for the *Sexton* court's analysis regarding the discretionary function exception's application to design claims, and the court in *Sexton* failed to articulate any other justification for its holding. The court believes *Sexton* is questionable authority.

In *Cope v. Scott*, 45 F.3d 445 (D.C.Cir. 1995), the District of Columbia Circuit held that the "maintenance" of a roadway was discretionary where the remedy for the deficiency the plaintiff complained of would have required a fundamental redesign of the roadway or change in its established uses. *Id*. at 451. By contrast, the court determined that the decision as to what type of warning signs to post, and where to place them, was not within the exception's scope. But that conclusion hinged on facts specific to that case. While "discretionary" factors including engineering concerns, aesthetics, and cost might have been weighed in the decision to place warning signs on the road in the first place, the court found that the failure to post more or different signs in that case was a purely engineering or operational decision because the Park Service had already posted a number of warning signs:

> the Park Service has chosen to manage the road in a manner more amenable to commuting through nature than communing with it. Having done so, and having taken steps to warn users of dangers inherent in that use, the Park Service cannot argue that its failure to ensure that those steps are effective involves protected "discretionary" decisions.

Id. at 452. If accepted uncritically, the D.C. Circuit's analysis could be read to allow a plaintiff to argue that once the government has decided to build a structure in the first place, its failure to construct more, better, or different structures was negligent and actionable. But if it is remembered that 23 warning signs already existed along a half-mile stretch of road in *Cope*, it becomes clear that the D.C. Circuit was maintaining the important distinction between original discretionary "decisions" and their implementation. The panel clearly viewed the decision to put in place a number of warning signs as the original decision, whereas their placement and content constituted mere implementation. Whereas a major undertaking like creating a roadway and placing a group of warning signs should be considered a discretionary decision involving competing considerations of public finance, safety, and aesthetics, more minor determinations like the precise number, placement, and content of those signs should be considered an operational matter. This understanding is consistent with the panel's treatment of the first argument put forward by the plaintiff regarding "maintenance" of the roadway. As the argument put forward by the plaintiff in this case challenges the very design of the guardrail, *Cope's* analysis is consistent with

the holding that it involves the execution of a discretionary function because the design chosen is too "big" a matter to be considered simply maintenance.

Plaintiff's reference to *Wysinger v. United States*, 784 F.2d 1252 (5th Cir. 1986) is equally unhelpful. In that case the Fifth Circuit held that the Forest Service's decision not to have a life guard at a developed swim site fell within the discretionary function exception. After a close reading, the court concludes that most of these cases essentially support the position of the United States in this matter. The question in applying the exception is what constitutes the relevant "decision" protected by the discretionary function exception. It is clear that the conscious choice amongst design alternatives is protected by the discretionary function exception, even if the decision to choose a particular design alternative is manifestly negligent. This is because the decision involves consideration of how best to accommodate competing needs. Using the *Berkovitz* analysis, the court cannot conclude that there were any statutes, regulations, guidelines, or professional standards that specifically prescribed the Corps' conduct in designing and constructing the guardrail. Thus the design was a matter of choice. Second, the design decision was grounded in social, economic, and political policy. The Corps evaluated cost, aesthetics, expected uses, and the need to protect pedestrians. This kind of balancing is exactly what Congress sought to insulate from review through a tort suit.

What would not be protected by the exception is the negligent execution or administration of that original decision. Thus the Corps decision to choose a particular method of repair is a conscious discretionary choice that

is clearly protected by the discretionary function exception. What would not be protected, for example, would be the Corps' negligent failure to construct that design, either by procuring the wrong materials, using inadequately trained personnel to make the repair, or by unnecessarily delaying the reconstruction. Such actions would clearly be simple negligent omissions, like failing to maintain a public works, that do not involve the exercise of discretion.

The court is aware that the distinction being drawn between these two actions is more clear in theory than in application. Whether an action being taken is part and parcel of the original decision, or should be considered part of the separate matter of executing or administering that decision, may be a close matter, particularly in these "public works" cases. There may arise questions relating to how extensively the original decision covered the details of its administration, how much time has passed between the original decision and the act complained of, how close in nature is the action taken to the original decision, etc. *Caplan*, 877 F.2d at 1320 (Martin, J., concurring) ("the line between a discretionary decision and its implementation is not so clear cut. . . . This ambiguity and the consequent disagreement is particularly acute in those instances where the government specifies certain procedures or methods for implementing its policy decision."). This is also made more difficult where the relevant decision is not made by a supervisor or department head whose normal job responsibilities include making such discretionary choices. The best that a court can do in such circumstances is use its best judgment. In this case, it seems clear that the decision to rebuild the guardrail

with the same design was inextricably intertwined with the decision to build the guardrail at all. This is clearly a discretionary choice, involving consideration of how to allocate scarce monetary and personnel resources.

Cases involving the actions of the government in its role as a property owner typically present a much closer question for application of the discretionary function exception, as they do not involve the quintessentially governmental activity of passing and enforcing laws and regulations designed to regulate the conduct of others. *Varig Airlines*, 467 U.S. at 813-14 ("whatever else the discretionary function may include, it plainly was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."). In these cases, the conduct of the government is more like that of an ordinary citizen in constructing and maintaining property. It is thus harder to draw a convincing distinction between these cases and the Supreme Court's statement in *Gaubert* that "[i]f one of the officials involved in this case drove an automobile on a mission connected with his official duties and negligently collided with another car, the exception would not apply. Although driving requires the constant exercise of discretion, the official's decisions in exercising that discretion can hardly be said to be grounded in regulatory policy." *Id.* at 325 n.7. This conclusion is certainly based, in large part, on the notion that driving a car is essentially an activity performed by private persons. The closer the conduct comes to being purely "private" in character, the less intuitive sense it makes to assert that the conduct was based on consideration of matters of public policy. In offering this observation, the court

wishes to make clear that it is not espousing the "governmental function" analysis repeatedly rejected by the Supreme Court. *Indian Towing Co. v. United States*, 350 U.S. 61, 64-65 (1955). The court notes, however, that looking at the regulatory/property owner role played by the governmental agency is a useful factor to be considered in analyzing the nature of the decision made. This suggestion has some support in Justice Scalia's concurrence in *Gaubert*, where he suggested that looking at the person who made the decision should be very helpful in determining whether the decision involved the actual exercise of discretionary authority:

> I think, however, that the level at which the decision is made is often relevant to the discretionary function inquiry, since the answer to that inquiry turns on both the subject matter and the office of the decisionmaker. In my view, a choice is shielded from liability by the discretionary function exception if the choice is, under the particular circumstances, one that ought to be informed by considerations of social, economic, or political policy and is made by an officer whose official responsibilities include assessment of those considerations.

Id. at 335 (Scalia, J., concurring). The Corps' role in this case was as a property owner, and thus was not engaged in the quintessential government activity of determining how best to regulate the conduct of private individuals. The decision to replace the guardrail with the same design was probably made by operational level Corps engineers, who do not routinely ponder the various social, economic, and political ramifications of their choices. However, the initial design of the guardrail was a

protected discretionary function grounded in policy considerations. The only duty of the Corps was to maintain that guardrail. The Corps replaced the damaged guardrail with one of equal quality, kind, and design. The replacement, although performed by operational personnel, cannot be divorced from the original design. They were simply implementing that design.

The purpose of sovereign immunity, to avoid undue interference with the day-to-day operations of government, is a laudable one. But the facts of this case, where the Corps was aware of serious accidents for nearly a decade, make the application of the discretionary function exception particularly harsh. It unfortunate that it is in the very nature of the doctrine of sovereign immunity that some negligent acts may leave a victim with no means for redress when the actor is the government.

B. Prior Knowledge

Plaintiff next argues that this case should be taken outside of the scope of the exception because the dangerous nature of the curve and guardrail was known to the Corps. There is certainly factual support for this argument. Over the last decade a number of serious accidents, some of them involving fatalities, have occurred at this very location. Some of these accidents also involved vehicles coming down this same approach and breaking through the guardrail. As for the legal basis for the argument, plaintiff asserts that where an agency has knowledge of a dangerous condition that is hidden from the public and the agency fails to act to remedy it, the discretionary function exception does not apply.

Plaintiff cites *Denham v. United States*, 646 F.Supp. 1021 (W.D. Texas 1986) *aff'd*, 834 F.2d 518, 520 (5th Cir. 1987) (decision to create swimming area discretionary, negligent failure to remove or warn of anchors is actionable) and *Butler v. United States*, 726 F.2d 1057, 1062-63 (5th Cir. 1984) (decision to dredge disretionary, negligent failure to warn swimmers of depression caused by dredging is actionable). These and other cases cited by plaintiff only reiterate the principle that implementation of a discretionary decision still requires due care. *Boyd v. United States Army Corps of Engineers*, 881 F.2d 895, 897-98 (10th Cir. 1989) (decision not to zone an area of the lake is discretionary, but the failure to warn swimmers that the area was open to boaters was not covered by the discretionary function exception as it did not involve public policy considerations); *Ducey v. United States*, 713 F.2d 504, 515 (9th Cir. 1983) (day-to-day management of government recreational area is not a discretionary function); *Smith v. United States*, 546 F.2d 872, 876-77 (10th Cir. 1976) (decision to leave part of national park undeveloped was discretionary, but failure to warn of dangers in undeveloped part of park was separate decision not implicating public policy concerns).

However, in *George v. United States*, 735 F.Supp. 1524 (M.D.Ala. 1990), the court held where the Forest Service had actual knowledge that a large alligator with a history of aggressive behavior was present in a pond maintained by the Forest Service for public use, the discretionary function exception did not apply to a claim that the failure of the Park Service to warn of its presence constituted negligence. In so holding, the court noted that the government should be amenable to suit "if the danger

were known to a Government agency and hidden from the party inured thereby." *Id.* at 1531. In distinguishing *Bowman*, the court noted that the Fourth Circuit pointed out and relied upon the fact that the dangerous condition of the road was open and obvious, whereas the danger posed by an alligator lurking in a pond was not obvious to a casual passerby. *Id.* at 1532.

Plaintiff's argument must fail for a number of reasons. First, *George* involved a danger that was both known by government and hidden from the person injured. Given the history of accidents there is little question that the danger here was well known to the Corps. But the danger here was also patently obvious to anyone approaching the dam from the south. The approach to the dam comes down a steady slope, and then makes a very sharp 90-degree curve to the right. Even for a passenger car, the need to slow down to 10 to 15 miles per hour to negotiate the turn would be self-evident. A driver would also recognize that if he failed to negotiate the turn he would run into the guardrail. In addition, the facts of this case made the danger even clearer to this plaintiff's decedent. Mr. Rich was driving a large truck and pulling a heavy trailer behind him. Further, the road was wet. Both of these factors meant that the driver would need extra time to slow his vehicle. Finally, plaintiff admits that Mr. Rich had driven this road many times before.

Given these facts, it is clear that this case belongs within a line of authority recognized and implicitly endorsed in *George*. The court in *George* distinguished its facts from those in *Chrisley v. United States*, 620 F.Supp. 285 (D.S.Carolina 1985), *aff'd*, 791 F.2d 165 (4th Cir. 1986). In *Chrisley*, the court followed "a line of cases holding

that held that where the danger is not hidden, the Government has no duty to warn." *Id.* at 290 (citing *Harmon v. United States*, 532 F.2d 669 (9th Cir. 1975)); *Henretig v. United States*, 490 F.Supp. 398 (S.D.Fla. 1980); *Fitzgerald v. Alba*, 261 F.Supp. 915 (S.D.N.Y. 1966). As noted above, the Corps did not lure plaintiff's decedent into a false sense of security by failing to warn of a hidden danger of which it alone possessed knowledge. The danger presented in negotiating the turn at the south end of Wolf Creek Dam was self-evident.

III. Conclusion

Having determined that no mandatory statute, regulation, or policy prescribed the Corps of Engineer's decision as to how the guardrail should be rebuilt, it follows that the design decision made involved an element of choice. As it further appears that the making of that choice required the consideration of aesthetic, engineering, financial and other factors ground in public policy, the court concludes that the decision was "discretionary" within the meaning of the FTCA, and accordingly this court is without subject matter jurisdiction to entertain plaintiff's claims. The court further concludes that while the Corps certainly had knowledge of a dangerous condition at the south end approach to the Wolf Creek Dam, that danger was also open and obvious, and accordingly the Corps did not have any extraordinary duty to warn of that danger such that the discretionary function exception of the FTCA would not apply.

An appropriate order shall issue.

s/ Thomas B. Russell
Thomas B. Russell, Judge
United States District Court

ENTERED
7/18/96
JEFFREY A. APPERSON,
CLERK
BY s/ I. Miller
DEPUTY CLERK

United States District Court
Western District of Kentucky
at Bowling Green

Betty Jean Rich — Plaintiff

v. — Case No. 1:95cv128-R

United States of America — Defendant

ORDER

Defendant has filed a motion for summary judgment (Docket 10). For the reasons set forth in the memorandum opinion entered this date, that motion is GRANTED. Plaintiff's complaint is dismissed with prejudice. It is so ordered.

This is a final and appealable order and there is no just cause for delay.

DATE: July 17, 1996

s/ Thomas B. Russell
Thomas B. Russell
United States District Court

cc: Counsel
s/im

ENTERED
7/18/96
JEFFREY A. APPERSON,
CLERK
BY s/ I. Miller
DEPUTY CLERK

W/19

96-6180

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
NOV 14 1997
LEONARD GREEN, Clerk

BETTY JEAN RICH, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JOHN BARRY RICH, DECEASED AND EXECUTRIX OF THE ESTATE OF JOHNNY N. RICH, DECEASED,	)	
Plaintiff-Appellant,	)	ORDER
v.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

BEFORE: KENNEDY, GUY, and MOORE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

s/la

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 96-6180

FILED
JUL 22 1997
LEONARD GREEN, Clerk

BETTY JEAN RICH, Individually and as Administratrix of the Estate of John Barry Rich, Deceased and as Executrix of the Estate of Johnny N. Rich, Deceased,

Plaintiff – Appellant,

v.

UNITED STATES OF AMERICA,

Defendant – Appellee.

Before: **Kennedy, Guy**, and **Moore**, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Western District of Kentucky at Bowling Green.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court dismissing the claim for lack of subject matter jurisdiction is AFFIRMED.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate:
NOVEMBER 26, 1997

COSTS: NONE

Filing Fee.....$
Printing.....$

Total.....$

A True Copy.

Attest:

s/ Audry Crockett
Deputy Clerk

28 U.S.C. §2674:

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other

defenses to which the Tennessee Valley Authority is entitled under this chapter.

---

28 U.S.C. §1346: United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast

Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1986.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to

an estate or interest in real property in which an interest is claimed by the United States.

---

28 U.S.C. §2680: Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

((g) Repealed. Sept. 26, 1950, ch. 1049, Sec. 13 (5), 64 Stat. 1043.)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" ' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Supreme Court, U.S.
FILED
APR 16 1998
CLERK

(2)

No. 97-1318

In the
Supreme Court of the United States
October Term, 1997

MATTHEW STARK and MARCIA NEELY,
Petitioners,

vs.

INDEPENDENT SCHOOL DISTRICT NO. 640,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Of Counsel:
Steven K. Green
AMERICANS UNITED
FOR SEPARATION OF
CHURCH AND STATE
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

Robert J. Bruno
Counsel of Record
ROBERT J. BRUNO, LTD.
1601 E. Hwy. 13, Suite 107
Burnsville, MN 55337
(612) 890-9171

Timothy Branson
DORSEY & WHITNEY, L.L.P.
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Attorneys for Petitioners

1998 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

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PETITIONERS' REPLY BRIEF

Respondent would have this Court believe that the opening and operation the Vesta school and the composition of its student body have nothing to do with religion. Instead, according to Respondent, the modification of the curriculum actually taught to conform to the Brethren's religious beliefs and the complete segregation of the Vesta school along religious lines are simply coincident facts. As the record reflects, however, Respondent contracted with the Brethren to open the Vesta school in a building owned by a Brethren member and operate that school with a curriculum modified to conform to the Brethren's religious objections to technology. Non-Brethren were not solicited to attend the Vesta School and only Brethren children have attended the Vesta school. Such segregation and religiously-modified curriculum are neither constitutional nor sound public policy. Whether the Vesta school was established under a state law or under a school district policy authorizing ad hoc accommodation of religion is constitutionally immaterial, because the principle of accommodation is not one without limits.

A. The questions raised by the petition may be decided as a matter of law based on the record before this Court.

Respondent's claim that the petition is based on disputed findings of fact, which is disfavored by S. Ct. Rule 10, Resp. Br. at 3, is a red herring. The district judge and the three circuit judges who heard this case all agree that summary judgment is appropriate, they simply divide 2-2 as to which side is entitled to summary judgment, once the law is applied to the facts. Accordingly, neither the weight of the evidence nor the credibility of witnesses is at issue. *Agosto v. INS*, 436 U.S. 748, 756 (1978) ("a district court generally cannot grant summary judgment based on its assessment of the credibility of the evidence presented"); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) ("at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial"). Instead, if

certiorari is granted, this Court will have the same concise, written record as the courts below -- affidavits, documents, and deposition testimony -- and no deference will be due the decisions below.[1]

In addition, because the issue of Church and State separation under the Establishment Clause is most often one of degree, *Board of Education v. Allen,* 392 U.S. 236, 242 (1968), an as-applied challenge will inevitably turn upon the facts of the case and an application of the law to the facts, and thereby involve this Court in an examination of the factual record made in the lower courts. Under Respondent's erroneous view of S. Ct. Rule 10, few if any, as-applied Establishment Clause cases would ever be reviewed by this Court.

B. Respondent's Brief in Opposition misrepresents the record below and rests on alleged facts outside of the record.

The Respondent's Brief In Opposition utterly fails, as it must, in its attempt to portray the Vesta school as an ordinary public school that just happens to be attended solely by Brethren children. Respondent attempts to explain the total religious segregation of students in the Vesta school, first by positing that non-Brethren were given a choice to attend the Vesta school;[2] and second, that such parental choice resulted in the coincidence that only the Brethren chose Vesta and everyone else chose Wabasso.[3] Even if

---

[1] See also *Bose Corp. v. Consumers Union of U.S., Inc.,* 466 U.S. 485, 501(1984) (Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law.)

[2] The May, 1993 letter soliciting interest in a multi-age classroom to be taught at the Wabasso school, which Respondent claims is the letter that solicited interest in the Vesta school, did not mention the Vesta school. See Pet. at 3 n.1. Thus, quick review of one letter is all that is needed to confirm Respondent's factual misrepresentation.

[3] Appendices J through M from the record below undisputedly establish that the religious segregation which occurred here was the direct result of the school board's actions.

those were the facts, parental choice by non-Brethren residing in Vesta and elsewhere to send their children to a school in Wabasso with an educationally-appropriate curriculum, rather than a school where the curriculum had been modified to conform to the Brethren's religious objections to technology, is insufficient to demonstrate the constitutionality of the Respondent's opening and operation of the Vesta school. See Judge Murphy's dissent. App. A at 23a.

Respondent also addresses the deletion of technology from the curriculum at the Vesta school by making the contradictory arguments that such deletions did not occur, while at the same time asserting that the modifications were compelled by an unspecified ad hoc school district policy. Respondent's assertion that there exists some "voluminous, uncontradicted record of evidence that computer, technology, and audio/visual education is available at the Vesta School," Resp Brf. at 7 n. 7, is false. At the close of discovery when the Vesta School had been in operation for its third year, both of the half-time teachers testified in their depositions that computers and audio/visual devices were not present in the Vesta school, and they were instructed not to teach with such devices. See Appendices H and I. Respondent's assertion could only be true in the hypothetical sense, either by transportation of a student to Wabasso, or by the teacher's request for such devices for her classroom.

Respondent also attempts to rely on photographs attached to the *amicus curiae* brief of the Wabasso Education Association, filed *ex parte* on the eve of the oral argument in the Eighth Circuit, which are obviously not a part of the record of this case, and which counsel for the *amicus* confirms were taken after the close of discovery and after the district court enjoined the operation of the Vesta school. If the pictures actually reflected both the reality of the school and the facts that existed prior to the district court's decision, Respondent's counsel would have surely arranged for such pictures to be taken and placed in the record of the case.[4]

---

[4] The lack of merit in Respondent's position is also found in its resort to another outside-of-record and cryptic factual assertion: "not all current students have requested an exemption from the computer curriculum." Resp. Brf. at 7-8.

C. Neither Respondent's policy nor Minnesota statute authorizing ad hoc accommodations prevents Establishment Clause scrutiny.

For the first time, during this litigation Respondent claims to have been acting pursuant to the following policy:

> "Students whose religious convictions oppose dancing or other activities are to be excused, without prejudice, from these activities in any class, activity, or party. When exclusions are requested in required classes or activities, suitable alternative activities shall be provided."

No reference to the policy appears in any document or record relating to the Vesta school prior to this litigation. Likewise, for the first time during this litigation, Respondent claims to have acted pursuant to Minn. Stat. Sec. 126.699, Pet. App. G, even though the statute was not enacted until May, 1993, and not effective until July 1, 1993.

The principle of religious accommodation, whether or not authorized by a policy or statute, is not one without limits. *Board of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687, 703 (1994). Prior accommodations found acceptable to this Court have allowed religious communities and institutions to pursue their own interest free from governmental regulation. *Id.*, at 705. Accommodations which provide special benefits using religious affiliation as a criteria violate the Establishment Clause. *Id.; Agostini v. Felton,* 117 S.Ct. 1997, 2016 (1997).

Because of the ad hoc nature of the benefit and the total lack of criteria for its application, the policy and the statute relied upon by Respondent do not satisfy the principles laid down by this Court in cases such as *Mueller v. Allen,* 463 U.S. 388 (1983), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1983), and *Witters v. Wash. Dep't of Servs. For the Blind,* 474 U.S. 481 (1986), for neutral programs providing defined benefits to a broad class. The ad hoc nature of the benefit here leaves no assurance that the next similarly situated group will receive the same benefit, i.e. its own school taught according to its religious precepts, and brings this

case under *Kiryas Joel*. Respondent's blind reliance on the policy and statute ignores the limits on accommodation imposed by the Establishment Clause. By singling out one religious group for a special benefit, i.e. the segregation of its students in a special jointly operated school, located in its home town in a building owned by its leader, taught in accordance with its religious precepts, Respondent has endorsed and advanced the beliefs of the Brethren. These special benefits, provided to no one else on this record, exceed the limits of permissible accommodation, and violate the neutrality principle underlying this Court's Establishment Clause jurisprudence.

CONCLUSION

The Eighth Circuit's decision flies in the face of well-settled Establishment Clause jurisprudence by approving the Respondent's establishment of a special school for one religious sect in order to teach a modified curriculum. The Respondent's attempt to divert the Court's attention from these undisputed facts is an insufficient basis to deny the petition. A writ of certiorari should be granted on this important federal question which has been decided below in conflict with relevant decisions of this Court, and so that the conflicting decisions among the circuits may be resolved.

Respectfully submitted,

Of Counsel:
Steven K. Green
Americans United For
Separation Of Church
and State
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

Robert J. Bruno
Counsel of Record
ROBERT J. BRUNO, LTD.
1601 E. Highway 13
Burnsville, MN 55337
(612) 890-9171

Timothy Branson
DORSEY & WHITNEY, LLP
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600

Attorneys for Petitioners

APPENDIX H -- EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER JENNY EICHTEN, OCTOBER 12, 1995

Q. Was it your understanding at the time of your interview that technology and media would not be taught in the classroom that you were under consideration for?
A. Yes.

***

Q. And were you told by Dr. Bates or anyone else from the school district that you should not use media and technology as part of the curriculum in the Vesta school?
A. That I would not teach it, yes.
Q. And did they say why?
A. It was parent -- or parent request from all of students that they did not wish for their students to participate in computer programming.
Q. Is that the only thing you were told, just about computers? Computers were the only objection?
A. No.
Q. What else?
A. And video tapes would not be used -- they did not want their child to view video tapes.

***

Q. Who did you discuss it with?
A. With Dr. Bates.
Q. And do you recall what he told you about that?
A. That if the student wishes to have computer programming, then transportation will be provided to the Wabasso school building for those students who wish to be involved in that.
Q. But otherwise it would not be provided at the Vesta school, is that right?
A. Correct.
Q. And there would be no use of films or videos at the Vesta school?
A. My job is to educate each child and you can educate a child without using a VCR.

Q. I'm not here to argue with you with that. The question is, did Dr. Bates tell you that you would not be using other things besides computers such as television, VCRs, films?
A. Yes.

***

Q. Calling your attention to page two at the bottom, section 6, the "Use of Technology" of [Pet. App. E], the only thing you had been told -- if I understand your testimony -- prior to starting this school was that those items that are described in section 6 would not be taught; correct?
A. Correct; by me.
Q. And if someone wanted to have them taught, they would have to be bused to the Wabasso building; is that correct?
A. Correct.

***

Q. Do you see the section of subpart five [of Minnesota Rule 3500.1100] that starts, "Media shall be taught in the context of the other required curriculum offerings"?
A. Yes.
Q. And its true, isn't it that media is not being taught in the context of the curriculum in your Vesta classroom?
[Objections]
A. No, it's not.

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Q. Now, it's true, isn't it, that all of the children who have attended the Vesta building are members of the Brethren?
A. I have not done a religious check, but as far as I know, yes.

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Q. Do you remember having a discussion with someone identifying themselves as Marcia Neely here maybe more than a year ago calling -- calling you up on the telephone and asking you about what's happening in the Vesta school?
A. Yes.
Q. And did you tell her that all of the children who are attending are Brethren children?
A. As far as my knowledge, they are.
Q. And did you tell her that you had as many students as you could handle at the present time?

A. I can't remember if I told her that.
Q. Well, is that true --
A. Yes.
Q. -- that at that time you had as many children as you could possibly handle?
A. Yes. Yes.
Q. And do you recall telling her that others had been discouraged from attending the Vesta building because you had as many children as you could handle?
A. That's not my decision.
Q. Well, I'm just asking if you may have said that to Marcia Neely in that phone call.
A. I don't remember.
(Appellee's App. below at 45-52)

APPENDIX I -- EXCERPTS OF THE DEPOSITION OF VESTA SCHOOL TEACHER AMY ROHLIK, OCTOBER 12, 1995

Q. And during your part-time work you had learned that there was no media or technology used in the school, is that right?

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A. Yes.
Q. And how did you become aware that it was not used in the school?
A. Well, when you go to the school you don't see computers there, you don't see VCRs there. And I guess she told me that there was an agreement made before this -- before she even started stating that if the children wanted to use computers, that transportation would be provided to the Wabasso building for that purpose.

***

Q. ... Were you aware that all the children belonged to a religious group called the Brethren?
A. Yes, I assumed they were.
Q. And how did you become aware of that?
A. You can tell by the way they dress the girls, and 18 of the 24 have the last name Paskewitz. So its pretty -- guess its just pretty common knowledge over there.

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Q. And such items such as: computers, movies, videos, television, radio, audio tapes; those are not used in the Vesta classroom, is that right?
A. That's right.
(Appellee's App. below at 73-75)

APPENDIX J -- EXCERPT OF REPORT OF JUNE, 1993 SCHOOL BOARD MEETING

The Wabasso Board of Education has reached agreement with the Vesta Brethren to proceed with plans for a K-6 elementary school at Vesta this fall.

The board approved a motion to 'begin pursuing legal avenues' to try and get the school open this fall.

The Brethren, who sent about a dozen representatives to Monday's board meeting, were also asked to look into how much it would cost to get the former Vesta school building - which they own - remodeled according to current state building, health and safety codes.

If it is legally possible to establish this school, it would be operated without the assistance of modern technology such as computers and video and audio equipment. The reasoning behind this is that the Brethren's religious beliefs prohibit them from using such items, and this has created a conflict in trying to send their children to the public school in Wabasso, which uses such teaching tools and methods.

To eliminate the need to remove these children from the public school environment and teach them at home, the Brethren made the proposal for a second school in Vesta last year.

The school would, according to state guidelines, be open to all students. Because it would be operated by District 640, it is a public school, and can not include religious teachings in the curriculum.

Clayton Paskewitz, who did most of the speaking for the Brethren group at Monday's meeting, said there should be no problems getting the school ready by fall, provided that the school district was committed to operating it.

'There was no point fixing it (the school) up until we got a definite yes or no,' he said.

Current enrollment in the school is projected to be 19 students in grades K-6. Because all 19 students would be taught by a single instructor, in one classroom, it is a similar

arrangement to the 'multi-age' classroom which is being considered for the Wabasso school this fall.

'It's just a matter of getting things worked out,' said board member Gordon Alexander, Vesta.

Board member Tom Franta wanted to know if the Vesta school was a one-year trial proposal.

'We would want a two-or three-year trial period,' Bates said.

'That's the way it should be for any new program,' board member Judy Dahms added.

'As far as dropping the program, unless it just doesn't go... you don't want to do that,' Alexander said.

'We would like to set it up for as long a time as possible,' Paskewitz pointed out. 'We don't see any big problems coming up...we're just asking for as simple a program as possible.'

The board agreed to proceed with the proposal, providing all the legal details could be worked out. A limit of $5,000 on the building remodeling was set; if cost estimates are projected to be higher than that, it will have to be brought back to the board for further consideration."
(Appellee's App. below at 42-43)

APPENDIX K – LETTER DATED JUNE 1, 1993

June 1, 1993

Dr. George W. Bates, Superintendent
Wabasso High School
Wabasso, Minnesota 56293

Dear Dr. Bates:

Thank you for your letter of May 27, 1993.

Following is a list of pupils from Vesta that are planning to attend the Vesta Public School. Two of our children have moved, bringing the total down to 19.

GRADE	PUPIL	FATHER
K	Karla Paskewitz	Tom Paskewitz
K	Connie Paskewitz	Ron Paskewitz
K	Ken Paskewitz	Herb Paskewitz
1	Kim Paskewitz	Randy Paskewitz
1	Jay Benson	Bruce Benson
2	Tricia Paskewitz	Clayton Paskewitz
2	Chuck Paskewitz	Herb Paskewitz
2	Stuart Paskewitz	Jeff Paskewitz
2	Ryan Paskewitz	Randy Paskewitz
3	Ben Paskewitz	Jeff Paskewitz
3	Sandra Benson	Bruce Benson
3	Roy Paskewitz	Tom Paskewitz
4	Lisa Benson	Bruce Benson
4	Jill Paskewitz	Herb Paskewitz
5	Eddie Paskewitz	Dale Paskewitz
5	Michelle Paskewitz	Jeff Paskewitz
5	Brad Paskewitz	Tom Paskewitz
6	Janella Paskewitz	Clayton Paskewitz
6	Daryl Paskewitz	Herb Paskewitz

Very Respectfully Yours,
(signed)
Lloyd R. Paskewitz

(Appellee's App. below at 41)

APPENDIX L -- EXCERPT OF REPORT OF SCHOOL BOARD MEETING, AUGUST, 1993

Though a few minor language details have yet to be finalized, the Wabasso Board of Education gave its approval Tuesday night to a proposed contract with Lloyd Paskewitz and The Brethren for operation of the Vesta elementary school.

A group of about 35 Brethren members, plus school insurance agents Darrell Baune and Lauree Price, were at the board meeting to discuss concerns with the contract.

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School board member Judy Dahms asked that the contract include some mention of the school district's hot lunch program, despite the fact that the Brethren children at the school would be taking all of their meals at home.

"What if some kids enroll who are not Brethren?" Dahms asked.

Superintendent George Bates said that the intention was to have Don's Cafe in Vesta cater the meals for those children and deliver them to the school.

"I don't see it as a problem," he said.

"I don't either... I just think it should be addressed," Dahms said.

Because of the enrollment numbers from among The Brethren for the upcoming school year, Bates did not expect this issue to come up, at least until 1994.

"There are going to be 19 students (in grades K-6)," Bates said. "That's the maximum number we can have with just one teacher."

Dahms said she had received several phone calls from parents concerned that the Vesta school would include religious teachings in its curriculum.

"The perception is that this is going to be a parochial school," concurred board chair, Leon Plaetz.

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Provisions were also made in the contract making the Vesta school a limited-technology school, as per Brethren request.

(Appellee's App. below at 54-55)